NO: 89-864 (3)

in the

Supreme Court

of the

United States

OCTOBER TERM, 1989

IN RE: HOLYWELL CORPORATION, et al.,

Debtors.

MIAMI CENTER LIMITED PARTNERSHIP, MIAMI CENTER CORPORATION, HOLYWELL CORPORATION, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Petitioners,

vs.

FRED STANTON SMITH, individually and as Trustee of the MIAMI CENTER LIQUIDATING TRUST; THE BANK OF NEW YORK; CITY NATIONAL BANK OF MIAMI, as Trustee under Land Trust #5008793, M.C. HOLDING PARTNERS, a New York General Partnership, and its General Partners, namely, ROBANK CORPORATION, H.D. LIQUIDATION, INC., ZENTAC INVESTMENTS, INC., BOTT FLORIDA HOLDING CORPORATION, AMERICAN SECURITY, LTD., and M. CENTER CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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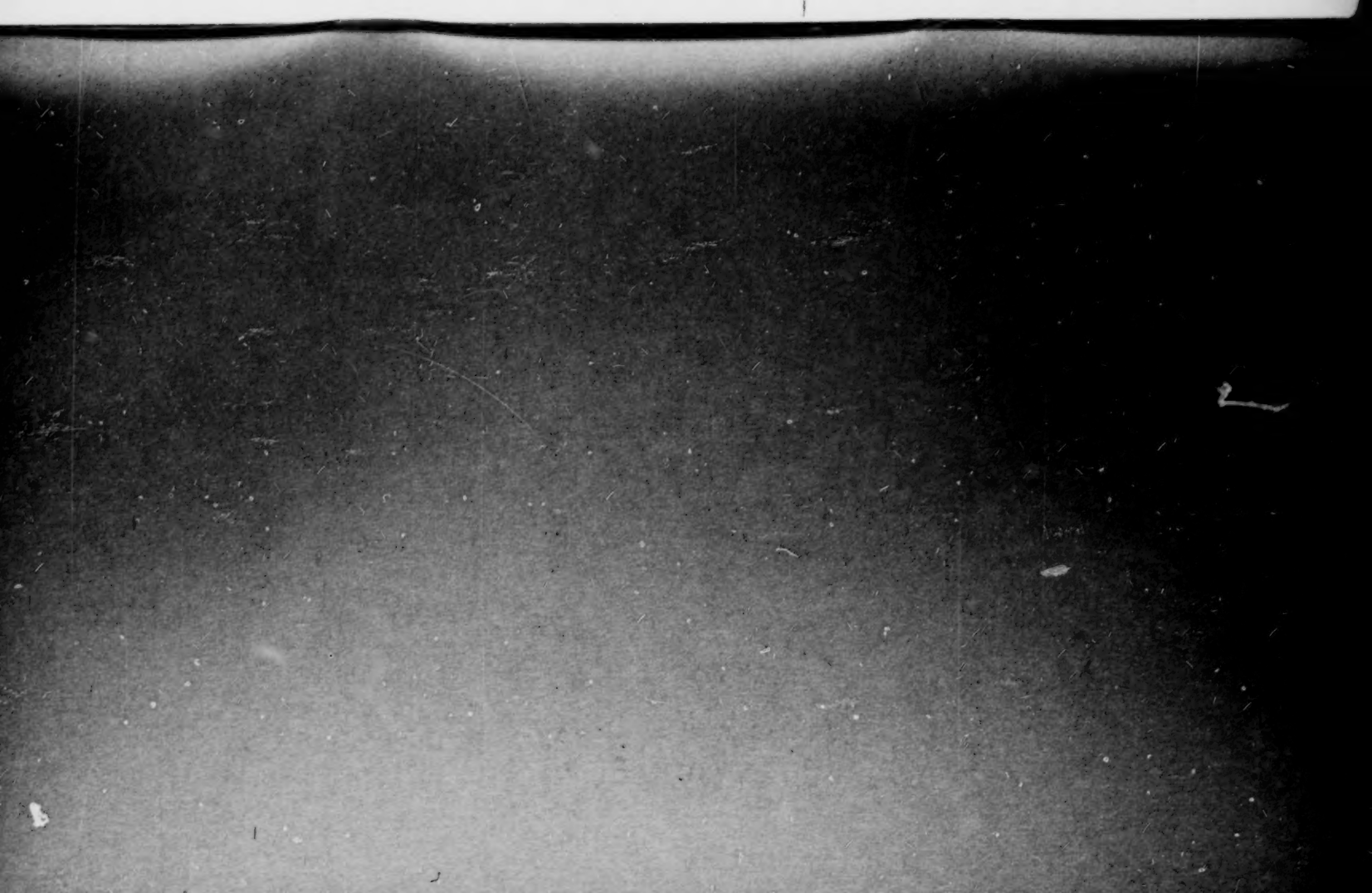

QUESTIONS PRESENTED FOR REVIEW

1. Whether the debtors have alleged any basis for review in this Court?

2. Whether the Eleventh Circuit erred in affirming the district court's affirmance and adoption of the bankruptcy court's Report and Recommendation on Petition for Removal, which found that the subject matter of the complaint removed to the bankruptcy court was a core proceeding over which the bankruptcy court had jurisdiction?

3. Whether the Eleventh Circuit erred in affirming the district court's affirmance of the bankruptcy court's dismissal of the complaint, where the complaint failed to state a claim on which relief could be granted?

4. Whether the confirmed plan of reorganization governs the scope of fiduciary duties owed by the liquidating trustee of the Miami Center Liquidating Trust?

5. Whether the Eleventh Circuit erred in affirming the district court's affirmance of the bankruptcy court's dismissal of the complaint, where all of the issues raised in the complaint had been resolved by the courts or were the subject of pending proceedings?

6. Whether the liquidating trustee can be liable in damages for common law claims where the acts complained of were mandated by a confirmed plan of reorganization?

PARTIES TO THE PROCEEDINGS

Theodore B. Gould

Holywell Corporation

Miami Center Corporation

Chopin Associates

Miami Center Limited Partnership

Robert Musselman, Esquire

Bank of New York

S. Harvey Ziegler, Esquire

Vance Salter, Esquire

Thomas Noone, Esquire

M.C. Holding Partners

Fred Stanton Smith, individually and as trustee of the Miami Center Liquidating Trust

Judge Sidney M. Weaver, United States Bankruptcy Court for the Southern District of Florida

Judge Eugene Spellman, United States District Court for the Southern District of Florida

City National Bank of Miami

Robank Corporation

H.D. Liquidation, Inc.

Zentac Investments, Inc.

Bott Florida Holding Corporation

American Security, Ltd.

Eleventh Circuit Court of Appeals

TABLE OF CONTENTS

TABLE OF CONTENTS (Continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

TABLE OF AUTHORITIES (Continued)

CITATION TO OPINIONS BELOW

The bankruptcy court's Report on Petition for Removal and Motion for Remand, and Order on Motions to Dismiss appears at Debtors' App. G at 24-26.

The district court's Order Affirming and Adopting Bankruptcy Court's Report and Recommendation on Petition for Removal and Motion for Remand appears at Debtors' App. F at 22-23.

The bankruptcy court's Order Granting Motions to Dismiss and Dismissing Adversary Complaint appears at Debtors' App. E. at 19-21.

The district court's Order Affirming Bankruptcy Court appears at Debtors' App. D at 7-18.

The Eleventh Circuit's *per curiam* affirmance appears at Debtors' App. C at 5-6; the denial of the debtors' petitions for rehearing and rehearing *en banc* appear at Debtors' App. B at 3-4; and the Judgment appears at Debtors' App. A at 1-2.

STATEMENT OF JURISDICTION

Debtors Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Associates and Theodore B. Gould seek review pursuant to 28 U.S.C. Section 1254(1) of the Eleventh Circuit Court of Appeal's affirmance of orders of the district court and bankruptcy court which allowed the removal and subsequent dismissal of a state court action filed by the debtors. The debtors sued Fred Stanton Smith, individually, and as Trustee of the Miami Center Liquidating Trust, and the Bank of New York for $40 million for claims arising out of the implementation of the confirmed plan of reorganization. Although Section 1254(1) provides for review of appellate decisions by writs of certiorari, the debtors' petition fails to meet any of the established criteria for review. The petition does not allege or demonstrate a genuine conflict with a decision of another federal court of appeals on the same matter, nor does it demonstrate a departure from the accepted and usual course of judicial proceedings. The petition also does not allege an important question of federal law which has not been, but should be, settled by the Court. *See* S.Ct.R. 17.1(a)-(c).

APPLICABLE STATUTES AND RULES

The statutes and rules applicable to the brief in opposition to the petition for writ of certiorari are printed in the appendix hereto.

STATEMENT OF THE CASE

Course of Proceedings

In October, 1987, the debtors filed an action in the state court against, *inter alia*, the Bank of New York ("bank") and Fred Stanton Smith, both individually, and as Trustee of the Miami Center Liquidating Trust ("liquidating trustee"), seeking money damages of almost $40 million. (Debtors' App. H at 27-44). The complaint was in five counts: negligence, breach of fiduciary duty, discharge of trustee, breach of contract, and conversion. *Id.* The debtors alleged that the liquidating trustee was liable for damages for failing to demand settlement from the Bank of New York of certain post-closing adjustments to the purchase price from the sale of the Miami Center to the bank's nominee; by allowing the bank a credit toward the purchase price of approximately $27 million at the closing, representing post-petition interest on its mortgage; by failing to resolve bankruptcy claim 502; by agreeing to pay *ad valorem* taxes on the Miami Center property; and by failing to reserve funds for the payment of income taxes allegedly due as a result of the sale of the Miami Center and the Washington properties. *Id.*

Pursuant to the bank's petition, the action was removed to the United States Bankruptcy Court for the Southern District of Florida, in accordance with 28 U.S.C. Section 1452 and Bankruptcy Rule 9027. (Debtors' App. G at 25). The debtors moved for remand to the state court. *Id.* Following a hearing on that motion, the bankruptcy court found that the issues raised by the complaint were core matters under 28 U.S.C. Section 157, and recommended that the district court grant the petition for removal and deny the debtors' motion for remand. *Id.* The district court thereafter affirmed and adopted the bankruptcy court's Report and Recommendation on Petition for Removal and Motion for Remand by Order dated March 2, 1988. (Debtors' App. F at 22-23).

The bankruptcy court then granted the motions of Fred Stanton Smith, both individually and as liquidating trustee, and of the bank to dismiss the complaint. (Debtors' App. E at 19-21). The bankruptcy court held, in part:

> 1. The motion to dismiss of Fred Stanton Smith individually be and the same is hereby granted. The complaint contains no sufficient allegations that Fred Stanton Smith was guilty of gross negligence, willful default or misconduct, as provided [by] Article 5, paragraphs 7 and 8 of Confirmed Amended Consolidated Plan of Reorganization. Such allegations are required to establish individual liability under the terms of the Plan.
>
> 2. The motion to dismiss of Fred Stanton Smith as Liquidating Trustee of the Miami Center Liquidating Trust be and the same is hereby granted upon the ground that all matters contained in the Adversary Complaint have either been resolved by this Court in other pending adversary complaints or motions which were heard before the Court (and which rulings are presently on appeal) or are the subject of pending adversary proceedings or motions and which will be resolved in ordinary course.
>
> 3. The motion to dismiss of the Bank of New York is granted upon the same grounds as stated above concerning the motion to dismiss of Fred Stanton Smith as Liquidating Trustee of the Miami Center Liquidating Trust.

Id.

The district court affirmed the bankruptcy court's order dismissing the complaint, holding that the confirmed plan of reorganization provides a standard of "gross negligence" in order to hold the liquidating trustee liable for damages,

that the allegations in the complaint did not allege any such conduct, and that the debtors are bound by the confirmed plan. (Debtors' App. D at 12-13). The district court further held that the complaint failed to state a claim upon which relief could be granted because the debtors did not claim the liquidating trustee breached any common law fiduciary duty while acting within the provisions of the plan, but rather that his actions mandated by the plan were violative of claimed common law duties. (Debtors' App. D at 13). The district court further held that all of the debtors' allegations had been resolved or were already the subject of pending proceedings. *Id.* at 14-17.

The Eleventh Circuit affirmed in a *per curiam* opinion, and denied the debtors' petitions for rehearing and rehearing *en banc*. (Debtors' App. B and C). This petition followed.

Facts

This petition for writ of certiorari is the Petitioners' fifth attempt at review in this Court. The Petitioners, all debtors in a bankruptcy proceeding now in its fifth year, were the developers of what is known as the Miami Center, a hotel and office complex connected by a shopping arcade located in downtown Miami, Florida. The Bank of New York, the construction lender, instituted foreclosure proceedings against the debtors in July, 1984. Immediately thereafter, in August, 1984, the debtors filed voluntary petitions under Chapter 11 of the Bankruptcy Code, owing approximately $350 million to over 400 creditors.

One year later, the bankruptcy court confirmed a plan of reorganization proposed by the bank which created the Miami Center Liquidating Trust and provided for the appointment of a liquidating trustee. The plan became effective October 10, 1985, after the debtors failed to post a supersedeas bond to stay the plan's implementation. The central features of the plan, in addition to creating the Miami Center Liquidating Trust, included the substantive

consolidation of the debtors and the sale of the Miami Center by the liquidating trustee to the bank's nominee. The district court affirmed the order of confirmation, *Holywell Corporation v. Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986), and the Eleventh Circuit Court of Appeals ordered the district court to dismiss the debtors' appeal as moot, finding the plan had been substantially consummated and the court could not grant meaningful relief to the debtors. *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir. 1988). The debtors' petitions for writs of certiorari and mandamus to this Court were denied. *See Miami Center Limited Partnership v. Bank of New York*, __U.S.__, 109 S.Ct. 69 (1988) and *In re Gould*, __U.S.__, 109 S.Ct. 148 (1988), respectively.

In pertinent part, the plan provides:

> No recourse shall ever be had, directly or indirectly, against the Trustee or any of his agents or employees personally by legal or equitable proceedings or by virtue of any statute or otherwise, it being expressly understood and agreed that all liabilities of the Trustee or such agents are [sic] employees or under this Trust shall be enforceable only against and be satisfied only out of the Trust Property.

(Debtors' App. K at 58). The confirmed plan further provides the liquidating trustee is not liable for any act done in good faith and in the exercise of his best judgment, nor is he liable except for gross negligence, willful default, or misconduct. *Id.*

The plan also provides the bankruptcy court shall retain jurisdiction after confirmation until all payments and distributions have been made, and until entry of a final decree, to enter any orders necessary or appropriate to carry out the terms of the plan. *Id.* The bankruptcy court has not yet entered a final decree, and payments and distributions called for by the plan are not complete, although the plan has been substantially consummated. *Miami Center Limited Partnership v. The Bank of New York, supra.*

In addition to receipt of monies from the sale of the Miami Center, the plan was also funded by the proceeds from the sale of what is known as the Washington properties and by the inclusion of all the debtors' assets, as defined by 11 U.S.C. Section 541(a). *Id.*[1]

The following is a summary of bankruptcy court and district court decisions that directly affect the issues raised in the debtors' adversary complaint, the dismissal of which has led to this petition:

1. *Post-closing adjustments.* On October 28, 1987, the liquidating trustee filed an adversary complaint against the debtors and the bank in which the liquidating trustee sought a determination of post-closing adjustments to the purchase price of the Miami Center, which was sold to the bank's designee pursuant to the plan of reorganization. The liquidating trustee also sought a determination of whether the bank was an undersecured creditor and thus not entitled to receive a credit for post-petition interest on its mortgage lien claims. (Trustee's App. A). The bankruptcy court held that the bank was not undersecured. (Debtors' App. S at 132). On appeal, the district court held that because the credit toward the purchase price of post-petition interest was an integral part of the plan of reorganization, any question regarding the order of confirmation was moot because the plan was not subject to collateral attack, and the issue of the bank's status as an undersecured creditor was thus required to remain unanswered. (Debtors' App. T at 133-140). The bank and the liquidating trustee subsequently settled the remaining counts of the complaint with the bankruptcy court's approval (and over the debtors' objections). (Trustee's App. G and H). The entire matter is now pending in a consolidated appeal by the debtors in the Eleventh Circuit.

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[1]The debtors also sought review in this Court of the bankruptcy court's order granting the liquidating trustee sole authority over the Washington proceeds. The petition was denied. *Holywell v. Smith*, __U.S.__, __S.Ct.__ (1988).

2. *Income Taxes.* On December 28, 1987, the liquidating trustee filed an adversary proceeding in the bankruptcy court against the debtors, the Bank of New York and the United States of America, in which the trustee sought, *inter alia*, a determination of the income tax liabilities of the trust arising from the sale of the Miami Center and the Washington properties. The bankruptcy court ruled that under the facts and circumstances of this case, the trust was not responsible for filing income tax returns or paying income taxes that may be due on the sale of the Miami Center and Washington properties. The district court affirmed. (Debtors' App. Q and R). The debtors and the government appealed to the Eleventh Circuit, where the case is pending. *United States v. Smith*, case no. 89-5862.

3. *Super-priority loans.* On the debtors' motion for repayment of super-priority loans, the bankruptcy court held that the claimed loans were in fact inter-debtor loans made after the debtors filed for bankruptcy, but before confirmation of the plan, and could be repaid only from debtor Miami Center Limited Partnership's assets to the lending debtors. The district court reversed, holding that the right to repayment of the super-priority/inter-debtor loans became an asset of the trust upon confirmation of the plan of reorganization. Accordingly, the liquidating trustee both owes and owns the "super-priority" loans and hence no payment is due. (Trustee's App. B). The debtors' appeal to the Eleventh Circuit remains pending, case no. 89-5950.

4. *Employer-in-fact.* The bankruptcy court considered the issue of whether a party (the debtors) other than the Internal Revenue Service could bring an action against the bank under the Internal Revenue Code for tax liabilities as an "employer-in-fact." The court held a third party cannot do so, and dismissed the debtors' complaint directed to this issue. (Trustee's App. C). The district court dismissed the debtors' appeal. (Trustee App. D).

5. *Ad valorem taxes*. The bankruptcy court entered an order transferring funds held in an escrow account for the payment of disputed *ad valorem* property taxes on the Miami Center from the liquidating trustee's former counsel (the law firm of Holland & Knight) to an escrow account in the names of the liquidating trustee's present counsel (Herbert Stettin, P.A.) and counsel for the bank (S. Harvey Ziegler, Esquire, of Kirkpatrick and Lockhart). (Trustee's App. E). The bankruptcy court also approved a settlement of the amount of such taxes. (Trustee's App. G). The district court affirmed both orders — which the debtors had appealed separately — and the debtors' consolidated appeal in the Eleventh Circuit remains pending, case no. 89-5165 (Trustee's App. G and H).

SUMMARY OF ARGUMENT

The debtors' arguments regarding both the impropriety of removing their complaint from state court to the bankruptcy court and the bankruptcy court's subsequent dismissal of the lawsuit are deceptive. They would have the Court believe that all of their allegations are strictly state common law claims which are only peripherally related to their tangled bankruptcy proceedings. There are however, several unalterable facts which the debtors have refused to acknowledge: (1) the plan provides for the bankruptcy court's retention of post-confirmation jurisdiction; (2) the law provides for the bankruptcy court's retention of post-confirmation jurisdiction; (3) each of the liquidating trustee's actions about which the debtors complain were required by the terms of the confirmed plan of reorganization; and (4) the confirmed plan is binding on the debtors.

Clearly the debtors have never accepted the plan of reorganization which was proposed by the bank, and this certiorari proceeding is simply the latest manifestation. The state court suit is a collateral attack on the plan and another end-run to avoid the federal courts of the Southern District of Florida. The bankruptcy court, district court, and Eleventh

Circuit recognized this tactic, and quite properly put an end to it by dismissing the case. The debtors have entirely failed to show this was error, and have failed to allege or demonstrate any appropriate grounds for review in this Court.

ARGUMENT

I.

THE DEBTORS HAVE FAILED TO DEMONSTRATE ANY BASIS FOR REVIEW IN THIS COURT

The debtors' contention that the removal of their complaint from state court to bankruptcy court violated their constitutional right of due process and their constitutional right to a jury trial are frivolous in light of the facts, the law, and the self-created labyrinthine procedural history of these bankruptcy proceedings. Accordingly, the removal of the complaint to the bankruptcy court and the dismissal of the complaint was entirely proper.

A. The bankruptcy court has post-confirmation jurisdiction.

The genesis of the bankruptcy court's assertion of jurisdiction is the plan of reorganization. The plan provides for the bankruptcy court to retain jurisdiction after confirmation to enter any order necessary or appropriate to carry out the terms of the plan. The plan was confirmed by the bankruptcy court, and the district court affirmed the order of confirmation on the merits after remand to the bankruptcy court for entry of findings of fact and conclusions of law. *Holywell Corporation v. The Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986). The debtors appealed to the Eleventh Circuit, which held that the district court should have dismissed the appeal as moot because the plan had been substantially consummated and the court could not grant meaningful relief. *Miami Center Limited Partnership v. The Bank of New York*, 838 F.2d 1547 (11th Cir. 1989). This Court denied the debtors' petitions for writs of certiorari and mandamus.

Miami Center Limited Partnership v. The Bank of New York, __U.S.__, 109 S.Ct. 69 (1988) and *In re Gould*, __U.S.__, 109 S.Ct. 148 (1988), respectively. The plan is the law of the case, and it binds the debtors, regardless of whether they voted to accept it. *See In re Blanton Smith Corporation*, 81 B.R. 440 (Bankr. M.D. Tenn. 1987); *In re Sanders*, 81 B.R. 496 (Bankr. W.D. Ark. 1987); *In re Monroe Well Service, Inc.*,80 B.R. 324 (Bankr. E.D. Pa. 1987); *In re Jartran, Inc.*, 76 B.R. 123 (Bankr. N.D. Ill. 1987); and *In re St. Louis Freight Lines, Inc.*, 45 B.R. 546 (Bankr. E.D. Mich., N.D. 1984); *see also* 11 U.S.C. Section 1141(a).

In addition to the plan's jurisdictional provision, the Bankruptcy Code also provides for the bankruptcy court to retain post-confirmation jurisdiction. Section 1142(b) provides "the court may direct the debtor and any other necessary party to execute or deliver or join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan." In addition, Bankruptcy Rule 3020 provides:

> (d) *Retained Power.* Notwithstanding the entry of the order of confirmation, the court may enter all orders necessary to administer the estate.

As both the confirmed plan and the substantive law provide the bankruptcy court with jurisdiction over the debtors and the liquidating trustee after confirmation of the plan, the removal of the complaint to the bankruptcy court was proper.

B. The complaint was a "core proceeding" and was properly removed to the bankruptcy court.

The allegations in the complaint constituted a "core proceeding" over which the bankruptcy court properly had jurisdiction under 28 U.S.C. Section 157. The debtors' arguments to the contrary are merely conclusions of law without any application of the law to the facts of this case.

In its Report on Petition for Removal and Motion for Remand, and Order on Motions to Dismiss, the bankruptcy court held that the "matters in that state court action are matters relating to the implementation and the administration of the plan of reorganization confirmed by this Court and affirmed by the District Court." (Debtors' App. G at 25). The debtors have failed to demonstrate that this is not so. The allegations made in the complaint, while couched in the language of actions at common law for breach of fiduciary duty, breach of contract, negligence, dismissal of the trustee and conversion, are clearly claims against the liquidating trustee, individually, for his conduct as liquidating trustee in carrying out the terms of the plan. The debtors do not allege that he failed to carry out the plan; rather, they allege injury because the liquidating trustee carried out the plan.

Removal is proper if the district court has jurisdiction to hear the case under 28 U.S.C. Section 1334. *See also* 28 U.S.C. Section 1452; 11 U.S.C. Section 9027. As the district court has original and exclusive jurisdiction to hear all cases arising under Title 11, pursuant to 28 U.S.C. Section 1334(a), the district court can refer such cases to the bankruptcy court. *See* 28 U.S.C. Section 157.

The matter at issue was a core proceeding because such cases include all matters relating to the administration of the estate, the allowance of claims, orders approving the use, lease, or sale of property, and other proceedings affecting the liquidation of assets or the adjustment of the debtor-creditor relationship. 28 U.S.C. Section 157(b)(2)(A),(B),(M),(N), and (O). The claims of the debtors against the liquidating trustee involve the administration of the bankruptcy proceedings.

Although a bankruptcy court lacks jurisdiction to decide a case on a right created by state law which is independent of the petition for reorganization, *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), this does not "restrict the bankruptcy court from hearing all claims based purely upon state law causes of action." *In re I.A. Durbin*, 62 B.R. 139, 143 (S.D. Fla. 1986). "The fact that the rule of decision in [a] case is provided by state law does not take away from the fact that [a] proceeding relates directly to the restructuring of relationships between a debtor and its creditors, which is at the core of the federal bankruptcy power." *In re Mankin*, 823 F.2d 1296, 1309 (9th Cir. 1987).

The connection between the allegations made in the complaint and the administration of the bankruptcy proceedings provides the basis for the lower court's finding that the complaint is a "core matter." *See Harley Hotels v. Rain's International*, 57 B.R. 773, 780 (M.D. Pa. 1985). Merely claiming that a complaint is a common law action for breach of fiduciary duty, negligence, breach of contract and conversion does not automatically confer "non-core" status on the proceedings, thereby depriving the bankruptcy court of subject matter jurisdiction. Regardless of what label is attached to a proceeding, the bankruptcy court is required to decide whether it is a "core" proceeding by determining the relationship, nexus or logical connection between the allegations and the bankruptcy proceedings. *Harley Hotels, Inc. v. Rains Int'l., Ltd.*, 57 B.R. at 780; *In re Lombard-Wall, Inc.*, 48 B.R. 986, 991 (S.D. N.Y. 1985); *Macon Prestressed Concrete Co. v. Duke*, 46 B.R. 727, 729-30 (M.D. Ga. 1985); *In re Lion Capital Group*, 46 B.R. 850, 856 (Bankr. S.D. N.Y. 1985). Put another way, it is the substance rather than the title of the claim that determines whether the matter is a core proceeding.

The close relationship between the allegations contained in the complaint and the bankruptcy proceedings is obvious. Each allegation against Mr. Smith involves actions done

within the scope of his authority as liquidating trustee. More importantly, all of the debtors' claims against Mr. Smith involve actions that were directed by the express terms of the confirmed plan of reorganization and other orders of the bankruptcy court to be performed by him, all of which are core matters. Logical outgrowths of a core matter, such as the order of confirmation, are also core matters, even if the label given to the claim is traditionally a state court action. *See In re J. B. Van Scriver Co.*, 73 B.R. 838, 844 (Bankr. E.D. Pa. 1987); *In re STN Enterprises, Inc.*, 73 B.R. 470, 482 (Bankr. D. Vt. 1987); *In re National Equipment and Mold Corp.*, 71 B.R. 24 (Bankr. N.D. Ohio 1986). Matters involving conduct governed by a confirmed plan of reorganization cannot be considered a garden variety common law action. *In re Arnold Print Works, Inc.*, 815 F.2d 165, 169-70 (1st Cir. 1987); *In re National Equipment and Mold Corp.*, 71 B.R. at 26-27; *In re Vincent*, 68 B.R. 865, 869 (Bankr. M.D. Tenn. 1987); *In re Franklin Computer Corp.*, 60 B.R. 795, 802-803 (Bankr. E.D. Pa. 1986).

All of the challenged actions of Mr. Smith involve his implementation of the plan, and the plan provides for the bankruptcy court to retain jurisdiction over such matters. By operation of law, the bankruptcy court was the proper forum to hear the debtors' complaint. The plan provided the bankruptcy court with the requisite jurisdiction, and the matter was a "core" proceeding. As such, the bankruptcy court had subject matter jurisdiction to dismiss the debtors' complaint.

The removal and dismissal of the debtors' complaint to the bankruptcy court was entirely proper. The debtors have failed to demonstrate a genuine conflict with any decision of this Court or another federal court of appeals; or any departure from the accepted and usual course of judicial proceedings; or an important question of federal law. The petition for writ of certiorari should thus be denied.

C. The bankruptcy court's dismissal of the complaint was proper.

The dismissal of the complaint was proper, for the plan of reorganization does not allow for an action against the liquidating trustee such as the one filed by the debtors. Moreover, all of the acts complained of had already been adjudicated, or were pending on appeal, or were pending before the bankruptcy court at the time the Order Granting Motions to Dismiss was entered. The debtors have failed to demonstrate any basis for review in this Court upon these facts.

1. The confirmed plan of reorganization, which is the law of the case, and which binds the debtors, does not impose liability for the acts complained of.

The confirmed plan of reorganization does not permit the imposition of liability on the trustee for the acts complained of. The plan provides that there shall be no recourse against the liquidating trustee in his individual capacity, and that all liabilities of the liquidating trustee shall be enforceable only against and satisfied out of property of the trust. The plan further provides that the liquidating trustee is not liable for any act performed in the exercise of his good faith and best judgment. It says the liquidating trustee can only be found liable in his capacity as trustee for gross negligence, willful default, or misconduct. (Debtors' App. K at 58). The debtors' complaint contained no such allegations.

The debtors' filing of the lawsuit against Fred Stanton Smith constitutes a collateral attack on the confirmed plan. The debtors do not allege that the liquidating trustee failed to carry out any of the plan's terms or that he negligently carried out the plan. Rather, they allege the plan itself is flawed and illegal, and that because the liquidating trustee carried it out as written, he should be held personally responsible to them for millions of dollars of damages. Obviously, the debtors' allegations relate to matters governed

by the plan and under these circumstances, the liquidating trustee is not guilty of negligence, let alone gross negligence. Section 1141(a) of the Bankruptcy Code makes it ineluctably clear that "the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor . . ." 11 U.S.C. Section 1141(a). Moreover, Section 1142(a) of the Bankruptcy Code requires the debtor and "any entity organized or to be organized for the purpose of carrying out the plan", such as the Miami Center Liquidating Trust, to carry out the terms of the plan. 11 U.S.C. Section 1142(a). As the debtors' opportunity to attack the merits of the plan is now moot, *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir. 1988), *cert. den.*, __U.S.__, 109 S.Ct. 69, the law precludes them from attacking the plan in this manner.

The filing of the complaint against Fred Stanton Smith personally for acts performed in accordance with the confirmed plan is a clear violation of the plan provisions and Section 1142 of the Bankruptcy Code. Such collateral attacks on a confirmed and substantially consummated plan should not be permitted.

Thus, the district court did not err in affirming the bankruptcy court's dismissal of the complaint.

2. All of the allegations contained in the complaint regarding failures to act were already the subject of court orders, were pending as an adversary proceeding or motions before the bankruptcy court, or had been decided and were on appeal when the debtors filed their complaint.

All of the acts about which the debtors complain were the subject of court orders, or were on appeal, or were pending before the bankruptcy court as an adversary proceeding or motion when the debtors filed this lawsuit. The debtors do not address these facts in their petition for writ of certiorari, nor do they demonstrate any basis for review in this court.

a. *Discharge of the liquidating trustee.* The debtors seek the liquidating trustee's discharge and then argue against the validity of his existence, as they have in virtually every one of the multitude of appeals taken from the bankruptcy court's orders in this case. This issue, however, is moot. *Miami Center Limited Partnership v. The Bank of New York, supra.* The plan of reorganization specifically provides for the appointment of a liquidating trustee, and the plan, as confirmed, is the law of this case. The debtors, moreover, did not appeal the bankruptcy court's August 12, 1985 order appointing Fred Stanton Smith as trustee of the Miami Center Liquidating Trust. (Debtor's App. I at 45). The appointment of a trustee under the plan of reorganization is the law of this case, and the debtors are barred from claiming otherwise. *See* 11 U.S.C. Section 1142(a). Moreover, the debtors want a state court to discharge the liquidating trustee, whereas the plan vests the authority to discharge and replace the liquidating trustee with the bankruptcy court. This too is the law of the case.

b. *Income taxes.* In the complaint, the debtors claim Fred Stanton Smith is liable to them for money damages for failing to establish a reserve for the payment of income taxes. They claim it was a breach of fiduciary duty. First, the debtors refer to no provision in the plan which requires the liquidating trustee to file tax returns or pay income taxes (because there are no such provisions). Second, and more importantly, the matter has already been adjudicated in favor of the liquidating trustee by the bankruptcy court and the district court. (Debtors' App. Q and R). The issue now pends before the Eleventh Circuit, case no. 89-5862. The complaint was thus properly dismissed because the tax issue had already been decided in favor of the liquidating trustee.

c. *Super-priority loans.* The debtors also sought money damages for the liquidating trustee's failure to establish reserves for the payment of super-priority loans. In fact, these were post-petition, inter-debtor loans. At the time the debtors

filed their complaint, the bankruptcy court had already adjudicated the issue, holding the debtors were entitled to repayment, but only from the assets of debtor Miami Center Limited Partnership. On appeal, the district court reversed this decision and held that the liquidating trustee owned the right to receive the repayment of the "super-priority" loans because the Miami Center Liquidating Trust became the owner of the debtors' right to repayment upon confirmation of the plan. See 11 U.S.C. Section 541(a). (Trustee's App. B). That is, the liquidating trustee both owed and owned the loans, hence no repayment was necessary. *Id.* There was thus no error in dismissing the complaint on this basis.

d. *Claim 502.* The debtors further alleged in their complaint that the liquidating trustee was liable in damages because he had not established a reserve for the claims of the Miami Center Joint Venture ("MCJV"), a partnership comprised of debtor Theodore Gould and non-debtor Olympia and York Florida Equity Corporation. Again, the lower courts properly recognized that this issue had already been dealt with. MCJV's Claim 502 was the subject of an order of the bankruptcy court (adv. proc. no. 87-0255-BKC-SMW-A), orders the district court (case no. 85-3430-CIV-ATKINS, consolidated with case nos. 87-1237-CIV-ATKINS, 87-1317-CIV-ATKINS, and 87-1583-CIV-ATKINS), and orders of the Eleventh Circuit (appeal nos. 86-5609, 88-5429 and 89-5346). MCJV filed Claim 502 in the debtors' Chapter 11 proceedings. The plan and numerous court orders deal with its payment. It is inconceivable that the debtors can seek money damages for the plan's treatment of Claim 502 where the debtors do not even own the claim. Moreover, the lawsuit against the liquidating trustee is an improper attempt to relitigate the issues concerning the claims of MCJV in a new forum.

e. *Post-petition interest.* The debtors also sought money damages on the ground that the liquidating trustee is personally liable for allowing the bank to take $27 million

in post-petition interest as a credit against the purchase price at the closing on the sale of the Miami Center. The bankruptcy court properly dismissed the complaint, for the $27 million dollar credit was due the bank under the express terms of the confirmed plan. The plan's terms, which bind the parties, provide for payment of post-petition interest to the bank. The debtors' claim that the bank is not entitled to this interest is further evidence of their "end-run" approach to litigation.

The liquidating trustee instituted an adversary proceeding against the Bank of New York and the debtors regarding the post-closing adjustments from the sale of the Miami Center. In particular, Count III of that adversary complaint sought declaratory relief on the question of whether the bank was undersecured and thus not entitled to post-petition interest. The bankruptcy court held the bank was not undersecured. The debtors appealed. The district court vacated the bankruptcy court's order based on the Eleventh Circuit's decision dismissing the appeal from the order of confirmation as moot, and ordered the bankruptcy court to dismiss that portion of the adversary, holding: "[T]he question of whether [the bank] was 'entitled' to obtain the $27 million is no longer subject to adjudication." (Debtors' App. T at 139). The district court found "[t]he Plan unmistakenly provided for the bank to have a credit for interest and expenses accruing through the date of closing . . ." *Id.* As the plan binds all parties, and any questions regarding the order of confirmation are now moot, the district court properly held that no court has the present authority to adjudicate the issue of the bank's undersecurity and its entitlement to post-petition interest. The debtors appealed to the Eleventh Circuit, where the case is pending.

The debtors' arguments are a collateral attack on the confirmed plan of reorganization and on numerous decisions of the courts which have dealt with the plan. This Court should not permit the debtors to use a petition for writ of

certiorari as an opportunity to reargue their earlier legal failures. Court decisions involving income tax liability, payment of post-petition interest to the bank, claims of MCJV, inter-debtor loans, *ad valorem* taxes, and federal withholding taxes are the law of this case, despite the debtors' contrary assertions.

3. There is no right to a jury trial in this case.

The debtors' argument that they were deprived of their right to a trial by jury under the Seventh Amendment of the Constitution of the United States is specious, for it is predicated on the false assumption that the complaint stated a cause of action.

The debtors' citation to *Leonard v. Vrooman*, 383 F.2d 556 (9th Cir. 1967), is inapplicable to this appeal. That case held that when a bankruptcy trustee acts in excess of his authority and is sued in state court, he is not protected by the injunctive power of the bankruptcy court. Mr. Smith is not a bankruptcy trustee, injunctions were not issued in this proceeding, and the complaint does not allege that he acted beyond the scope of his duties, as defined by the plan. Mr. Smith is a contract trustee appointed by the bankruptcy court pursuant to a confirmed plan of reorganization, and was sued by the debtors for carrying out the plan's terms. *Vrooman* is also inapplicable because the plan in this case contains a reservation of jurisdiction which provides for the bankruptcy court to retain jurisdiction to enter any order necessary or appropriate to effectuate the plan.

Dairy Queen, Inc. v. Wood, 82 S.Ct. 894 (1962), is cited by the debtors for the proposition that there is a *per se* right to a trial by jury under the Seventh Amendment of the United States Constitution. Quite obviously, a complaint must first state a cause of action to entitle a plaintiff to this right, and this complaint fails to do so. The debtors' reliance on *Granfinanciera, S.A. v. Nordberg*, __U.S.__, __S.Ct.__ (1989), and *Northern Pipeline Construction Company v. Marathon*

Pipeline Company, supra, to support their claim to a *per se* right to a jury trial is also misplaced. The issue in *Granfinanciera* was whether a creditor had any right to a trial by jury once the cause was at issue. That is, once there was a complaint and answer. This case was never at issue, for the debtors' complaint failed to state any legally cognizable claim upon which relief could be granted, and was properly dismissed on motion. There is no *per se* right to a trial by jury, as the debtors contend, for the right to proceed to trial must first be established by the filing of a claim upon which relief could be granted. Moreover, *Northern Pipeline, supra*, does not hold that any claim given a common law title is a non-core matter.

None of these cases demonstrate the existence of a genuine conflict with the Eleventh Circuit's opinion in this case, nor do they demonstrate that the Eleventh Circuit departed from the accepted and usual course of judicial proceedings. As no basis for review in this Court exists, the petition for writ of certiorari should be denied.

CONCLUSION

None of the cases cited by the debtors demonstrate the existence of a conflict between the decision of the Eleventh Circuit Court of Appeals and the decision of another federal appellate court or this Court. Moreover, the debtors have not demonstrated that the Eleventh Circuit's opinion departed from the accepted and usual course of judicial proceedings or that the issues raise an important question of federal law, for the debtors' arguments have no merit. Clearly, the bankruptcy court had jurisdiction to entertain the debtors' law suit because the plan and the law provides for post-confirmation jurisdiction under the circumstances of this case. The bankruptcy court's dismissal of that law suit was also proper because the complaint failed to state a claim on which relief could be granted. Neither the plan of reorganization nor the law imposes liability for the acts complained of. As such, the debtors' petition for writ of certiorari fails to allege or demonstrate any basis for review in this Court and should be denied.

RESPECTFULLY SUBMITTED,

Herbert Stettin, Esquire

Appendix

INDEX TO APPENDIX

INDEX TO APPENDIX (Continued)

EXHIBIT "A"

IN THE UNITED STATES BANKRUPTCY COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

Case Nos. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

Adv. No:

HOLYWELL CORPORATION,

Debtor,

FRED STANTON SMITH, as Liquidating Trustee of the Miami Center Liquidating Trust,

Plaintiff,

vs.

THE BANK OF NEW YORK, HOLYWELL CORPORATION, MIAMI CENTER CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, CHOPIN CORPORATION and THEODORE B. GOULD,

Defendants.

COMPLAINT FOR BREACH OF CONTRACT AND DECLARATORY RELIEF

ALLEGATIONS AS TO ALL COUNTS

1. Fred Stanton Smith (Smith) is the liquidating trustee of the Miami Center Liquidating Trust.

2. The Bank of New York is the proponent of the Amended Consolidated Plan of Reorganization (the Plan), under which Smith was appointed and in which the Bank of New York was named as purchaser of the Miami Center property under the Contract of Sale dated October 10, 1985 (the Contract).

3. This adversary complaint is brought pursuant to 28 U.S.C. Sections 157 and 1334(a), Bankruptcy Rules 7001(1) and 7001(9), and the reservation of jurisdiction in Article XIV of the Plan.

4. The sale of the Miami Center occurred on October 10, 1985. Smith and the Bank of New York executed the Contract and a letter agreement modifying the Contract, copies of which are attached as Exhibit A and B, respectively.

5. At the closing, Smith and City National Bank of Miami, as Trustee, on behalf of the Bank of New York, executed a Closing Statement, a copy of which is attached as Exhibit C.

COUNT I-BREACH OF CONTRACT

6. Thereafter, the Bank of New York breached the Contract, as modified by the letter agreement, by failing and refusing to "make such abatements, apportment (sic) or adjustment promptly" although final or liquidated amounts have been ascertained.

7. Smith has been damaged by the failure and refusal of the Bank of New York to complete the post-closing adjustments required by the Contract, as modified by the letter agreement. Although demand for payment and credit of all sums due Smith has been made, the Bank of New York has failed to pay or credit Smith all sums due him under the Contract, as modified by the letter agreement.

WHEREFORE, Smith demands judgment against the Bank of New York.

COUNT II-DECLARATORY RELIEF

8. Each allegation in paragraphs one through seven is realleged as if set forth herein.

9. Smith and the Bank of New York have attempt to complete and agree upon the post-closing adjustments

required under the Contract, as modified by the letter agreement. A number of items have been agreed upon, but a number of items remain in dispute.

10. There is a real, present controversy between Smith and the Bank of New York of the right of Smith either to receive credit as seller for those items remaining in dispute, or the extent to which Smith is entitled to receive credit for items in dispute.

11. Attached as Exhibit D is a proposed closing statement which treats each required post-closing adjustment (excepting only Smith's claim for reimbursement from the Bank of New York for post-petition interest from an undersecured creditor). The proposed closing statement reflects the position of both parties, the amounts in controversy, and comments as to the items in dispute.

WHEREFORE, Smith asks this Court to determine the matters in controversy between the parties.

COUNT III-DECLARATORY RELIEF

12. Each allegation in paragraphs one through eleven is realleged as if set forth fully herein.

13. Smith takes the position, as does the Bank of New York, that the Bank of New York was not an undersecured creditor, and that it was entitled to receive credit against the purchase price at closing for post-petition interest. Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, Chopin Corporation and Theodore B. Gould (collectively referred to as Debtors) have taken a contrary position, claiming the Bank of New York was an undersecured creditor, and therefore not entitled to receive post-petition interest on its lien.

14. The Bank of New York received credit at closing against the purchase price of $27,050,115.02, as post-petition interest.

15. The Debtors contend the Miami Center property sold by Smith to the Bank of New York was worth less than the amount of the lien claimed by the Bank of New York, and that Smith is entitled to recover those sums paid as post-petition interest to the Bank of New York at closing representing an amount in excess of the fair market value of the property sold.

16. The Debtors claim of undersecurity is based upon a statement in the Confirmation Order of August 8, 1985. The Order does not refer to a finding of fact or evidence in the record as support for that conclusion. That order was appealed, and on remand, the Bankruptcy Court rendered an Order on Remand, dated January 30, 1986, which omits any statement that the Bank of New York was an undersecured creditor. The District Court affirmed the Order on Remand, and the Eleventh Circuit has dismissed the Debtors' appeal as moot.

17. The issue of whether the Bank was an undersecured creditor is a real, present controversy between Smith and the Bank of New York on one hand, and the Debtors on the other.

WHEREFORE, Smith asks the Court to determine the matters in controversy between the parties.

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BY: /s/ Herbert Stettin
HERBERT STETTIN, ESQUIRE

EXHIBIT "B"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 87-970-CIV-KEHOE

THE BANK OF NEW YORK,

Apellant,

v.

HOLYWELL CORPORATED,
THEODORE B. GOULD, et al.,

Appellees.

ORDER ON BANKRUPTCY APPEAL

THIS IS AN APPEAL from the United States Bankruptcy Court for the Southern District of Florida, involving the legal status and priority of certain loans made by two debtors to another debtor during the pendency of five related bankruptcy cases.[1] This Court has jurisdiction in this matter pursuant to Title 28, United States Code, Section 158.[2]

I.

BACKGROUND OF BANKRUPTCY PROCEEDINGS

Five interrelated debtors filed for bankruptcy in August 1984. One of the five debtors, Theodore B. Gould ("Gould") had the controlling interest in the other four debtors: Holywell Corporation ("Holywell"), which was owned one hundred percent by Gould and which itself owned one

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[1]Case Nos. 84-01590, 85-01591, 84-01592, 84-01593 and 84-01594.

[2]The Bankruptcy Court's findings of fact may not be reversed unless shown to be "clearly erroneous." Bankruptcy Rule 8013 and Fed.R. Civ.P. 52(a). The Bankruptcy Court's conclusions of law are reviewable *de novo*. *In re Multiponics, Inc.*, 622 F.2d 709, 713 (5th Cir. 1980).

hundred percent of Twin Development Corporation ("Twin"), its subsidiary, and interests in various Gould partnerships; Miami Center Limited Partnership ("MCLP"), of which Gould was a limited partner and the individual general partner; Miami Center Corporation ("MCC"), which was owned one hundred percent by Holywell, and which served as a limited partner and as the corporate general partner of MCLP; and Chopin Associates ("Chopin"), a general partnership owned equally by Gould and MCC, which was the owner and lessor to MCLP of the property encompassing the Miami Center Project,[3] the essential business enterprise encompassing the bankruptcies of the five debtors. (Debtors Holywell and Gould are appellees herein, as is Twin. The Liquidating Trustee, Fred Stanton Smith, although named as an appellee, has stated that his ". . . interest . . . is in fact the same as that of the Appellant," The Bank of New York.)

The Appellant Bank of New York ("Bank") lent $197 million dollars to the debtors for construction of the Miami Center Project. During the bankruptcies, the proceeds of the sale of certain "cash rich" properties (three buildings developed by Gould in the Washington, D.C. area), which had been pledged by the debtors in connection with the loan, were determined to be "cash collateral" of the Bank under Title 11, United States Code, Section 363, to be segregated and held subject to further order of the Bankruptcy Court.[4] The three buildings ("Washington Properties") were subsequently sold, with net proceeds of approximately $32 million, part of which was thereafter advanced to the debtors as a post-petition loan because of MCLP's operating losses. That loan and other, similar loans from the Washington Properties were

[3]The Miami Center Project was a large commercial project situated prominently in downtown Miami, Florida, consisting of an office building, hotel, garage, rental space, furnishings, fixtures and equipment.

[4]No appeals were taken from these determinations, with the proceeds becoming "property of the estates" under 11 U.S.C., §541(a)(6).

given "super-priority" status superior to all claim against MCLP except the Bank's lien. (The principal amount of the loans exceeded 4.7 million.)

Subsequent to those "super-priority" loans, the Bankruptcy Court approved the substantive consolidation feature of the Bank's Plan and confirmed the bank's Plan[5] Well over a year after the effective date of the Plan, the Liquidating Trustee moved for authority to pay the super-priority claims, which was followed with the filing of similar motions by the Debtors and by Twin for payment to themselves. This appeal is from the granting of those three motions and from the denial of the Bank's motion for rehearing and clarification.

The Bank's first contention in this appeal is that it was error to rule that the discharged Debtors, and not the Liquidating Trustee, owned the post-petition loans. The Bank further contends on appeal that it was error to authorize the Liquidating Trustee to repay the post-petition loans, because the loans had either become extinguished by substantive consolidation or, if they survived, were subordinated.

In support of these arguments, the Bank emphasizes, inter alia, the following facts. First of all, in an earlier appeal in these bankruptcies, another judge of this Court ruled that Gould and Holywell, the movants for the sale of the Washington Properties, ". . . repeatedly made representations to the effect of acknowledging that the proceeds from the Washington Properties allocable to Twin would be available to creditors in satisfying claims against their estates in

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[5]The order of substantive consolidation and the confirmation of the order confirming the Bank's Plan were ultimately affirmed by the District Court. *Holywell Corporation v. The Bank of New York*, 59 B.R. 340 (S.D. Fla. 1986). The debtors' appeal therefrom was dismissed. *Miami Center Limited Partnership v. Bank of New York*, 820 F.2d 376 (11th Cir. 1987).

bankruptcy."[6] That Court affirmed the Bankruptcy Court, which granted the Liquidating Trust" . . . complete control over Twin's proceeds arising from the sale of the Washington properties . . ."[7] Also, because the Gould and Holywell estates were relatively solvent and the MCLP estate was insolvent, creditors of the former estates had concerns about protecting their own particular interests. At the hearing, and as reflected in the order, on the motion for the approval of the loans, there was agreement that the loans should be restored to the Holywell and Gould estates, from which they came, before the claims of the MCLP creditors, other than the Bank. Furthermore, under the Amended Consolidated Plan, a Trust was established, with a ". . . designated . . . Trustee of all property of the estates of the Debtors within the meaning of §541(a) of the Code . . .," with the result that the post-petition loans become a nullity, inasmuch as the Liquidating Trustee owned the rights to repayment of the loans and, at the same time, had the duty to repay the loans from the cash and property within the Trust. Thus, the bank concludes that the Trustee should have "cancelled" the promisory notes or else have written a repayment check to himself.[8]

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[6]*Holywell Corporation v. The Bank of New York*, Case No. 86-0848-CIV-RYSKAMP, Order of February 20, 1987, at p.6.

[7]Footnote 6 at p. 11.

[8]The Bank also argues that while the Debtors would ordinarily be expected to oppose the payment of any claim from the Liquidating Trust, in this instance, they did not oppose the repayment of the post-petition loans, but rather moved for such repayments when they realized that the assets in the Liquidating Trust would be insufficient to pay the claims of all creditors, particularly in contemplation of the large payment to be made to Olympia & York Florida Equity Corporation (Gould's partner in the Miami Center Joint Venture).

A.

The Bankruptcy Court Erred in Concluding that the Debtors, and not the Liquidating Trustee, Owned the Post-Petition Loans

Pursuant to the Amended Consolidated Plan of Reorganization, a Trust was established

> . . . of all property of the estates of the Debtors within the meaning of §541(a) of the Code, including but not limited to, Miami Center, the Washington Proceeds, and all claims and causes of action, if any, of the Debtors described in Exhibit C and those pending in the litigation against BNY ("Trust Property") to hold, liquidate, and distribute such Trust Property according to the terms of this Plan.

By the terms of the Plan, the "Washington Proceeds" are includable as property ("proceeds" or "product") within the meaning of Section 541(a)(6) of the Bankruptcy Code.[9] Another judge of this Court has, in effect, found the "Washington Proceeds" to be part of the Trust, and the Eleventh Circuit Court of Appeals has affirmed, as moot, an appeal therefrom.[10] Furthermore, from the facts presented, it appears clear that the post-petition loans come within the provisions of Section 541(a)(7) of the Bankruptcy Code, as an

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[9]§541. Property of the Estate

(a) The commncement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and whomever held:

* * * * *

(b) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

[10]*Holywell Corporation v. Bank of New York*, 59 B.R 340 (S.D. Fla. 1986); *Miami Center Limited Partnership v. Bank of New York*, 820 F.2d 376 (11th Cir. 1987).

interest in property by the estate acquired after commencement of the case.[11]

Thus, upon the effective date of the Plan, by its own terms, these "proceeds" became the property of the estate under Section 541(a), with the rights to repayment becoming property of the Liquidating Trustee, and with the liability of the MCLP to repay the loans becoming a claim against the Liquidating Trustee.[12]

B.

The Bankruptcy Court Erred in Concluding and Authorizing the Liquidating Trustee to Repay the Post-Petition Loans, to the Extent They Were Extinguished by Substantive[13]

"[L]iabilities of consolidated entities *inter se* are extinguished by . . . consolidation." *In Re Auto-Train Corporation*, 810 F.2d 270, 276 (D.C. Cir. 1987). Thus, the

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[11]For the proposition that under Section 541(a)(7), the property of the estate includes "[a]ny interest in property that the estate acquires after the commencement of the case," see *Matter of Wilson*, 694 F.2d 236, 237-8 (11th Cir. 1982).

[12]As succinctly stated in the Appellant's Initial Brief, upon the effective date of the Plan, "the Liquidating Trustee both *owned* and *owed* those Loans." [emphasis added]

[13]Additionally, under this issue, Bank argues that even if the post-petition loans survived substantive consolidation, they were subordinated by virtue of Sections 1142(a) and (b), of the Code, pursuant to which an entity organized to carry out the plan and the Bankruptcy Court are charged with implementing the Plan, and that nowhere under the Code is such an entity or the Court authorized to modify the plan's priorities. Thus, the Bank argues that even if there is no substantive consolidation, nonetheless, because the Debtors, as Affiliated Creditors under the Plan, are assigned a priority lower than Olympia & York Florida Equity Corporation, the as-yet unpaid creditor, their claim is thereby subordinated and the priorities of the plan may not be changed. See, e.g., *Miller v. Meinhard-Commercial Corporation*, 462 F.2d 358 (5th Cir. 1962).

assets and liabilities of all the consolidated debtors would thereby become merged, eliminating all inter-debtor obligations and guarantees.[14]

This legal principle applies to the present case. As indicated by the Bank, even the Debtors themselves have acknowledged in prior District Court proceedings, see *Holywell Corporation v. Bank of New York*, 59 B.R. 340, 350 (S.D. Fla. 1986), and in a brief before the Eleventh Circuit Court of Appeals, that these inter-debtor loans were, in fact, eliminated by substantive consolidation.[15]

C.

In response to the issues raised by the Bank, the Debtors rely strongly on the position taken by the Bankruptcy Court that ". . . the substantive consolidation of the five estates . . . did not extinguish any of the post-petition claims presently under consideration . . . [and that] . . . [i]f this result was in fact intended by the [B]ank when it presented its plan, it should have been made explicit [inasmuch as the Bankruptcy Court] . . . would not have confirmed a plan nullifying . . ." the post-petition loan orders.[16]

Acknowledging the considerable weight and deference to be accorded to the Bankruptcy Court's position, nonetheless, the present facts and attendant legal considerations militate against the approval of such a result. First of all, unlike the more customary situation, this case involves the infusion of

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[14]See, e.g., *In Re Richton International Corporation*, 12 B.R. 555, 556 (Bkrtcy S.D.N.Y. 1981).

[15]In the "Brief of Appellants [Debtors]," at p.12 (Case Nos. 86-5286 and 86-5386) the Debtors argue to the Eleventh Circuit Court of Appeals that "[t]he consolidation had the intended effect of eliminating all inter-Debtor claims, such as the super-priority loans from Gould and Holywell to MCLP."

[16]Order Denying Reconsideration, April 1, 1987.

funds originating not from a party or source outside the assets or control of the bankrupt entities, but rather from two inter-related party debtors to yet another inter-related party debtor. In other words, these particular "super-priority" loans consist of funds not newly-created and infused into the case, but rather of funds previously existing and accounted for, within the assets of, or under the control of, certain of the co-debtors, that is, funds already within the purview of the bankruptices. Such funds are clearly distinguishable from those found, for example, in the case of *In Re Flagstaff Foodservice Corporation*, 739 F.2d 73 (2d Cir. 1984), relied upon by the Appellees, where a creditor infused fresh funds, previously no part of, and unknown to, the bankruptcy case. *Flagstaff Foodservice*, therefore, lacks a basic underlying factor for the "super-priority" status of the present loans, namely, the protection of the lenders' creditors over the creditors of the loans' recipient. Thus, in part, because the Appellant Debtors, upon discharge, walked away from the bankruptcies, free of any *liabilities*, vis-a-vis the "super-priority" loans, they should not now be heard to assert a claim to the *assets*.

Indeed, if the course of the loans were to be mapped out, the funds would be seen travelling from the lender debtors (Point A) to the recipient debtor (Point B). Then, when repayment funds became available, the funds would be seen returning from Point B to Point A. Where, in the interim, however, substantive consolidation has occurred and the resultant Liquidating Trust has been created, Point A has *become* Point B, and vice versa. Therefore, the only remaining movement, to the extent it can be meaningfully described, would be viewed as a constructive repayment entirely within the trust itself and would, so to speak, constitute a "taking

from Peter to pay Paul" from one "estate" within the merged debtors to another.[17]

Secondly, especially in view of the posture and interrelation of the parties and of the surrounding circumstances presented, there is a legal consideration to be noted and observed; namely, the full and absolute priority rule, see *Consolidated Rock Products Co. v. DuBois*, 312 U.S. 510, 61 S.Ct. 675, 682, 85 L.Ed. 982 (1941), which ". . . precludes the participation of equity interests in assets until the creditors have been made whole." *In Re Evans Products Company*, 65 B.R. 870, 873 (S.D. Fla. 1986). Thus, the discharged Debtors' claims may not accrue, in effect, until the remaining creditors of Gould and Holywell "have been made whole."

D.

A final issue is presented by the Appellees, asserting that the Liquidating Trustee cannot legally exist under the Bankrutpcy Code and thus cannot be said to own the super-priority loans. As the Appellant Bank aptly points out, this issue was not raised below in the Bankruptcy Court and that no appeal was taken from the order appointing the Liquidating Trustee. Therefore, no comment on this point is called for.

[17]One of the alternate remedies sought by the Bank is a "formal transaction" whereby the Liquidating Trustee, who is responsible for the suject assets *and* liabilities, would write a repayment check in his capacity as the "super-priority" loans debtor, to himself in his capacity as the "super-priority" loans creditors.

III.

Wherefore, to the extent the subject loans are repayable as "super-priority" obligations of MCLP ahead of the claims of any MCLP creditors, the appealed Orders should be, and are, affirmed. Furthermore, to the extent necessary to be in confirmity with this opinion, this matter is remanded to the Bankruptcy Court (i) in order to clarify and/or supplement its Orders to assure that repayment of the loans be made to the *estate* of Gould and Holywell, subject to the claims of the remaining creditors of the estate, and (ii) to ascertain, where necessary, the specific source of the repayment funds.

DONE AND ORDERED in Chambers at Miami, Florida, this 4th day of November, 1988.

/s/ JAMES W. KEHOE
James W. Kehoe
United States District Judge

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EXHIBIT "C"

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NOS. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

ADV. PRO. NO. 88-0158-BKC-SMW-A

In Re:

HOLYWELL CORPORATION, et al.,

Debtor.

MIAMI CENTER LIMITED PARTNERSHIP,
MIAMI CENTER CORPORATION,
and HOLYWELL CORPORATION,

Plaintiffs,

vs.

UNITED STATES OF AMERICA, and
THE BANK OF NEW YORK,

Defendants.

ORDER DISMISSING THE COMPLAINT

THIS ADVERSARY PROCEEDING was heard on May 9, 1988 upon the Motions to Dismiss the Complaint filed by Defendants, the United States and The Bank of New York.

The Complaint alleges that The Bank of New York is responsible to pay certain withholding taxes, interest, and penalties as "employer in fact" instead of the debtors, pursuant to Sections 3505 and 6323(i) of the Internal Revenue Code.

Having reviewed the pertinent pleadings and heard argument of counsel, it is hereby ORDERED and ADJUDGED that:

1. The Complaint fails to state a legally sufficient cause of action, because only the IRS has the legal right to assert a claim against The Bank of New York under Sections 3505 and 6323 of the Internal Revenue Code. *In re Brandt-Airflex Corp.*, Case No. 87-5034 (2d Cir. slip op. March 30, 1988), *aff'g.* 78 Bankr. 10 (E.D. N.Y. 1987).

2. However, to the extent that the IRS's exercise of discretion might affect these estates with respect to interest or penalties on withholding taxes previously paid to the IRS, the Court is unwilling to permit the IRS an open-ended or indefinite period within which to prosecute such a claim or to decline to prosecute it.

3. Accordingly, the United States, through the Special Procedures Section of the IRS, is directed to take one of the following actions, as it may elect, on or before Tuesday, May 31, 1988:

(a) Formally assert any alleged claim the IRS may have as against The Bank of New York with respect to any failure by the debtors to pay any withholding taxes or the interest or penalties on such taxes; or

(b) Notify in writing counsel for The Bank of New York, the Trustee, and the debtors, as well as debtor Theodore B. Gould (appearing *pro se* in this proceeding), that the alleged claim will not be asserted by the United States.

4. If the United States fails to make such an election and to take one of the two actions described in Paragraph 3 of this Order, then it shall be barred from thereafter asserting any alleged claim (against the debtors, the Bank, or otherwise) relating to any failure by the debtors to pay any withholding taxes or the interest or penalties on such taxes.

The Court retains jurisdiction to enforce the provisions herein.

DONE AND ORDERED in Chambers, at Miami, Florida, this 12th day of May, 1988.

United States Bankruptcy Judge

Vance E. Salter, Esq., shall
furnish copies of this order
to all persons listed on
the attached Service List

SERVICE LIST

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2215 AmeriFirst Building
One Southeast Third Avenue
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EXHIBIT "D"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-1272-CIV-Hoeveler

Bankruptcy
Case Nos: 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

In re:

HOLYWELL CORPORATION, et al.,

THE UNITED STATES OF AMERICA,

Appellant,

vs.

MIAMI CENTER LIMITED PARTNERSHIP, et al.,

Appellees.

MIAMI CENTER LIMITED PARTNERSHIP, acting by THEODORE B. GOULD and MIAMI CENTER CORPORATION, its General Partners; and HOLYWELL CORPORATION,

Cross-Appellants,

vs.

UNITED STATES OF AMERICA, and THE BANK OF NEW YORK,

Cross-Appellees.

ORDER ON BANKRUPTCY APPEAL

THIS CAUSE is before the Court on an appeal filed by the United States of America ("IRS") from the Order Dismissing the Complaint entered on May 12, 1988 in an adversary proceeding in the bankruptcy court. A Cross-Notice of Appeal was filed by the plaintiffs in the adversary proceeding. The issues were briefed and the parties appeared for argument before the Court on November 2, 1988.

The Court has considered the briefs and the statements of counsel agreeing upon the relief which should be entered on this appeal. Thereupon, the Court having considered the record and being otherwise fully advised in the premises, it is —

ORDERED AND ADJUDGED As follows:

1. The bankruptcy court's dismissal of the adversary complaint for failure to state a legally sufficient cause of action is affirmed insofar as the complaint attempted to assert a claim against defendant, The Bank of New York (the "Bank") under Sections 3505 and 6323 of the Internal Revenue Code. Only the IRS has the legal right to assert such a claim against Bank. Affirmance of this portion of the bankruptcy court order is expressly without prejudice to further proceedings which may be necessary in the bankruptcy court or other court of competent jurisdiction to determine (i) the amount, if any, which may be owed by the Trustee of the Miami Center Liquidating Trust for the withholding taxes described in the adversary complaint; (ii) the amount of any interest or penalties the IRS has claimed on such taxes; or (iii) the rights of the Trustee or the cross-appellants to seek indemnification against the Bank under Florida law.

2. Paragraph 2, 3 and 4 of the bankruptcy court's order required the IRS to take affirmative action against the Bank under Sections 3505 and 6323 of the Internal Revenue Code, failing which it would be barred from thereafter asserting

any future claims against the debtors, the Bank or any other party with respect to withholding taxes or the interest or penalties on such taxes. The parties to the appeal stipulate and this Court finds that the bankruptcy court did not have jurisdiction to order the IRS to assert a claim against the Bank pursuant to Section 3505 of the Internal Revenue Code and, accordingly, paragraphs 2, 3 and 4 of the bankruptcy court's order are reversed and vacated.

DONE AND ORDERED in Chambers, at Miami, Florida, this 16th day of February, 1989.

/s/ WILLIAM M. HOEVELER
U. S. District Court Judge

Copies furnished to:
ROBERT A. MARK, ESQ.
THEODORE B. GOULD
ROBERT M. MUSSELMAN, ESQ.
HERBERT STETTIN, ESQ.
FRED STANTON SMITH, ESQ.
JOSE F. DELEON, ESQ.
DEXTER LEHTINEN, ESQ.
THERESA MITCHELL, ESQ.
THOMAS F. NOONE, ESQ.
S. HARVEY ZIEGLER, ESQ.
VANCE E. SALTER, ESQ.

EXHIBIT "E"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 88-0682-Civ-NESBITT

IN RE:

HOLYWELL CORPORATION, et al.,

HOLYWELL CORPORATION, MIAMI CENTER CORPORATION, MIAMI CENTER LIMITED PARTNERSHIP, CHOPIN ASSOCIATES, and THEODORE B. GOULD,

Appellants,

vs.

CITY NATIONAL BANK OF MIAMI, as Trustee under Land Trust #5008793, and FRED STANTON SMITH, as Trustee of the Miami Center Liquidating Trust,

Appellees.

ORDER DISMISSING APPEAL

Appellants in this bankruptcy appeal are the Debtors in the Miami Center bankruptcy. Appellees are the Trustee of the Miami Center Liquidating Trust, and City National Bank of Miami. The issues raised in this appeal (which is but one of many arising from the massive bankruptcy case) involve an escrow account established at the time of the sale of the Miami Center for the payment of real estate taxes to Dade County.

In an Order dated February 4, 1988, Judge Weaver approved a transfer of the escrow fund from the account of the Trustee's former attorneys to that of the present attorneys. Appellants contend that Judge Weaver did not have jurisdiction to consider or approve the escrow transfer because ratification of the reorganization plan effectively

terminated the bankruptcy proceedings. The court finds this argument completely without merit. The reorganization plan espressly provides that the bankruptcy court shall oversee implementation of the plan; moreover, the Bankruptcy Code provides for continuing jurisdiction. *See* 11 U.S.C. § 945 and Bankruptcy Rule 3020(d). Therefore, Judge Weaver appropriately exercised his jurisdiction by approving the escrow transfer.

Appellants raise several other arguments challenging the validity of the escrow account, but because those issues were not raised in the order appealed from, they are not properly before this court.

For the above-stated reasons, it is hereby

ORDERED and ADJUDGED that this appeal is DISMISSED.

DONE AND ORDERED in chambers, at Miami, Florida, this 3rd day of January, 1989.

/s/ LENORE C. NESBITT
Lenore C. Nesbitt
United States District Judge

cc: counsel of record

EXHIBIT "F"

IN THE UNITED STATES BANKRUPTCY COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO: 84-01590/91/92/93/94
BKC-SMW

HOLYWELL CORPORATION, et al.,

Debtors,

CITY NATIONAL BANK OF MIAMI,

Plaintiffs,

vs.

FRED STANTON SMITH, etc. et. al.,

Defendants.

ORDER ON ADVERSARY COMPLAINT

THIS CAUSE having come on to be heard on January 26, 1988, on Adversary Trial and Counterclaim of Defendants Holywell Corporation, et. al., and the Court having heard argument of counsel, having reviewed the pleadings on file and being otherwise fully advised in the premises, it is hereupon

ORDERED AND ADJUDGED AS FOLLOWS:

1. The escrow fund in question, presently held in the name of Holland and Knight, is determined to be a fund specifically set up for the purpose of paying ad valorem taxes, if any, due on the Miami Center property. The Court reserves jurisdiction to determine at a later date, by appropriate adversary complaint or otherwise, all remaining issues concerning the claims made for the payment of ad valorem taxes on the property in question.

2. The escrow fund previously held in the name of Holland and Knight is ordered transferred to a new escrow

to be held in the name of S. Harvey Ziegler and Herbert Stettin, subject to the further order of this court. No withdrawals or other disbursements from this escrow shall be permitted without Order of Court after notice and a hearing. The Court authorizes the existing escrow account to remain in effect in order not to cause any penalty for early withdrawal, provided that the name of the escrow is changed. The escrowees shall have the right to jointly select an authorized bank to continue to hold the funds in escrow.

3. The Counterclaim filed by Holywell Corporation et. al. be and it is hereby dismissed, without prejudice.

DONE AND ORDERED in Chambers, at Miami, Florida, this 4th day of February, 1988.

/s/ SIDNEY M. WEAVER
Sidney M. Weaver
United States Bankruptcy Judge

ms
conformed copy:
Herbert Stettin, Esquire
will immediately upon receipt
of a signed copy forward same to
all counsel of record.

EXHIBIT "G"

3039OAAS

IN THE UNITED STATES BANKRUPTCY COURT IN AND FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 84-01590-BKC-SMW
84-01591-BKC-SMW
84-01592-BKC-SMW
84-01593-BKC-SMW
84-01594-BKC-SMW

ADV. NO. 88-0117-BKC-SMW-A

IN RE:

HOLYWELL CORPORATION, et al.

CHOPIN ASSOCIATES, acting by THEODORE B. GOULD and MIAMI CENTER CORPORATION, Its Partners, and

MIAMI CENTER LIMITED PARTNERSHIP, Acting by THEODORE B. GOULD and MIAMI CENTER CORPORATION, Its General Partners,

Plaintiffs,

vs.

FRED STANTON SMITH, as Trustee of THE MIAMI CENTER LIQUIDATING TRUST,

THE BANK OF NEW YORK,

CITY NATIONAL BANK OF MIAMI, as Trustee of Land Trust #5008793,

DADE COUNTY, FLORIDA, a Municipality,

JOEL ROBBINS, as Property Appraiser of DADE COUNTY FLORIDA

FRED GANZ, as Tax Collector of DADE COUNTY, FLORIDA

ORDER APPROVING AMENDED SETTLEMENT OF AD VALOREM TAX CLAIMS

THIS CAUSE came before the Court for hearing in Miami on October 31, 1988 pursuant to an Order Setting Hearing on Trustee's Motion For Approval Of Amended Stipulation Settling Ad Valorem Tax Claims, dated October 11, 1988. The Court had heard the testimony presented, examined the exhibits received into evidence, observed the candor and demeanor of the witnesses who testified, considered the argument of counsel, and is otherwise fully advised in the premises. Based upon that testimony, exhibits and argument, the Court makes the following findings of fact and conclusions of law:

1. The Court had previously scheduled a hearing on a Motion for Approval of Compromise of Ad Valorem Tax Claims on April 28, 1988, and consolidated that hearing with a pending adversary proceeding brought by Chopin Associates et al., case# 88-0117-BKC-SMW-A.

2. On October 31, 1988, the Liquidating Trustee moved the Court to take judicial notice of all of the testimony, exhibits and argument received by the Court at the hearing held on April 28, 1988. No party in interest voiced any objection to this and the Court orally granted the motion. The Court has therefore, taken cognizance of and has considered as a part of the record concerning the Amended Settlement of Ad Valorem Tax Claims, the record made before the Court on the proposed settlement of the ad valorem tax claims previously heard on April 28, 1988.

3. On that date, the proponents of the settlement put in evidence testimony from John Fletcher, an attorney who specializes in ad valorem tax matters, that the burden of proof on a taxpayer requires proof by substantial competent evidence of the exclusion of every reasonable hypothesis of value used by the tax assessor, using recognized methods of valuation. Mr. Fletcher cited pertinent Florida law

supporting this conclusion, and testified as to the difficulty imposed on a taxpayer in such circumstances.

4. The proponents of the settlement also elicited testimony from A.H. Blake, a former tax assessor of Dade County, that the tax settlement proposed was fair and reasonable, and was in the best interest of the liquidating trust. He concluded the settlement proposed favored the liquidating trust more than it did the Bank of New York.

5. The proponents also put in evidence the testimony of Fred S. Smith, the liquidating trustee. Mr. Smith is an experienced local real estate broker and testified that, based on his experience as a broker and as president of Keyes Corporation, he believed the settlement is in the best interest of the liquidating trust. He specifically identified the letter agreements of February 24, 1988 between the liquidating trust, the Bank of New York and the Dade County Attorney; the letter of March 17, 1988 modifying that letter agreement, and the letter of March 22, 1988 further modifying that agreement. He agreed with that settlement and recommended it. In each instance, he confirmed the settlement was clearly favorable to the liquidating trust because it would terminate a number of pending ad valorem tax suits; would prevent exposure of the liquidating trsut to judgments in favor of the County for sums far in excess of the sums to be paid under the terms of the settlement agreement; and would preserve the right of the debtors to continue to seek the invalidation of all claims asserted by the County for ad valorem taxes on the ground that no proofs of claim had ever been filed. The Court further notes that a settlement would stop the considerable attorneys' fee and cost expenses involved in prosecuting and defending the numerous state court ad valorem tax suits.

6. The Debtors placed into evidence a number of depositions taken in the adversary complaint, together with a large number of exhibits in support of their position that the proposed settlement was not in the best interest of

creditors and that the County had no enforceable claims which it could assert because of its failure to file proofs of claim.

7. The County put on the testimony of Frank Jacobs, an assistant property appraiser, who testified as to the litigation risks and other considerations taken into account by the County in entering into the agreement. He also testified that the transaction was not structured in any manner so as to favor the Bank of New York over the liquidating trust.

8. The Court received evidence from Theodore B. Gould concerning the interest claimed by St. Joe Paper Company. Mr. Gould conceded he could not locate any written agreement concerning any continuing ownership interest by St. Joe Paper Company, nor any written evidence of any claim which that company might have for the recovery of overpayment of taxes for 1979.

9. From the testimony presented and a review of the exhibits and other documents put in evidence, it appears the issues involved for the years 1979, 1980 and 1981 are for refunds of real property taxes paid based on claims of overassessment. The settlement proposed includes a waiver by the liquidating trust of any further claim for refund for those years, concomitant with a waiver by the County of all claims for additional taxes, including People Mover and other special assessments and for personal property taxes.

10. The principal issue in the 1983 tax dispute involves a demand by Dade County for additional ad valorem taxes based upon a dispute concerning whether the office building property was substantially completed on the valuation date. The County has conceded for purposes of this settlement that the property was not substantially complete; a very considerable savings to the liquidating trust.

11. The dispute for the years 1984 and 1985 concerns claims of additional taxes due based upon disputed

assessments of the entire property. The settlement adjusts the assessments very considerably in favor of the liquidating trust.

12. As a preliminary, the Court takes note of the fact that the Plan of Reorganization, which was confirmed by the Court and which has been substantially consummated, reflected the value of the property in question (inclusive of certain personal property) to be $255,600,000. There were MAI appraisals supporting this valuation, and the Bank of New York through its nominee paid this sum on October 10, 1985. Under such circumstances there is the possibility the County would argue the disputed assessments for 1984 and 1985 were reasonable and the liquidating trust might be liable for taxes which would be substantially in excess of the amounts agreed upon in the settlement proposal.

13. Under the terms of the original settlement proposal of April, 1988, the parties agreed to a schedule of assessed values, additional taxes due, and some pre and post-petition interest on those sums. A copy of that schedule is attached to these findings as Exhibit A.

14. The sums agreed to be paid constitute full satisfaction of all issues, interest and claims for taxes which were or could have been raised in any of the pending ad valorem tax litigation or in the matters which were filed concerning these claims for taxes.

15. As part of this settlement proposal, the County also agreed to settle its disputed ad valorem tax claims with the Bank of New York for periods subsequent to 1985 when the Bank of New York was the owner of the property in question.

16. As an additional consideration to the liquidating trust in the settlement, the Bank of New York and the liquidating trust have agreed the bank will reprorate the 1985 taxes previously received from the liquidating trust as a credit on the closing statement on October 10, 1985, and will refund to the liquidating trust those sums found to be

due on reproration based on a reduced assessment, together with interest at 6.91%. It was estimated this will result in the liquidating trust receiving $400,000 to $500,000.

17. As a further part of the agreement between the liquidating trust and the County, the liquidating trust agreed to pay interest on the sums due the County under the settlement, at the rate provided by Florida Law from and after April 1, 1988. Following the conclusion of the hearing on April 28, 1988, and the submission by the parties and review by the Court of post trial memoranda, the Court expressed the view that it was satisfied the settlement was in the best interest of the liquidating trust with the exception of those sums provided in the settlement agreement to be paid to Dade County representing post-petition preconfirmation interest, which totaled approximately $155,000.00. The Court expressed the view that, as a matter of substantive law, payment of post-petition preconfirmation interest to a non-consensual lien creditor was not permissible.

18. The liquidating trustee, the Bank of New York and Dade County requested the Court grant leave to conduct further discussions in an attempt to resolve this remaining issue. The Court encouraged this. Thereafter, an amended stipulation for settlement of the ad valorem tax claims was filed with the Court. It provided there would be an additional reduction of $109,870.90 of the sums to be paid by the liquidating trust as ad valorem taxes to the County. This meant that the sums to be paid by the liquidating trust would be adjusted downward from $3,430,753.97 to $3,320,883.07. This sum, together with interest at the rate of $25,455.41 per month from April 1, 1988, until paid to Dade County, would constitute the entire obligation of the liquidating trust to the County.

19. The approval of the proposed amended settlement agreement is a matter within this Court's sound discretion. *See In re Jackson Brewing Company*, 624 F.2d 599 (5th Cir. 1980); *In re Teltronics Services, Inc.*, 762 F.2d 185 (2d Cir.

1985); *In re Prudence Co.*, 98 F.2d 559 (2d Cir. 1938), *cert. denied* 306 U.S. 636, 59 S.Ct. 485, 83 L. Ed. 1037 (1939).

In order to exercise this discretion properly, the Court must consider all of the relevant facts and evaluate whether the compromise suggested falls below the "lowest point in the range of reasonableness." *See e.g., In re Teltronics Services, Inc., supra* at page 189; *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983). The Fifth Circuit in *In re Jackson Brewing Co.*, 624 F.2d at 602 stated as follows:

> To assure a proper compromise the bankruptcy judge must be apprised of all the necessary facts for an intelligent, objective and educated evaluation. He must compare the 'terms of the compromise with the likely rewards of litigation.' *Protective Committee for Independent Stockholders of T.M.T. Trailer Ferry, Inc. v. Anderson*, ('T.M.T. Trailer'), 390 U.S. 414, 425, 88 S.Ct. 1157, 1163, 20 L. Ed. 2d 1, 10 (1968). He must evaluate and set forth in a comprehensible fashion:
> (1) the probability of success in the litigation, with due consideration for the uncertainty in fact and law.
> (2) the complexity and likely duration of the litigation and any attendant expense.
> (3) all factors bearing on the wisdom of the compromise.

Id. at 424-25, 88 S.Ct. at 1163, 20 L. Ed. 2d at 9-10.

20. In making its evaluation, this Court need not rest its decision whether to approve a settlement upon a resolution of ultimate factual and legal issues which underlie the disputes that are proposed to be compromised. *In re Teltronics Services, Inc., supra.* In a Fifth Circuit decision which is binding on this Court, *Florida Trailer and Equipment Company v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960), the Court stated:

> Of course, the approval of a proposed settlement does not depend upon establishing as a matter of legal certainty that the subject claim or counterclaim is or is not worthless or valuable. The probable outcome in the event of litigation, the relative advantages and disadvantages are, of course, relevant factors for evaluation. *But the very uncertainties of litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressional infusion of a power to compromise. This is a recognition of the policy of the law generally to encourage settlements. This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty. Parties would be hesitant to explore the likelihood of settlement apprehensive as they would then be that the application for approval would necessarily result in a judicial determination that there was no escape from liability or no hope of recovery and hence no basis for a compromise.* Thus, this Court need not resolve each disputed matter in determining the propriety of the settlement, rather, the Court may, and should, make a pragmatic decision on the basis of all equitable factors. (Emphasis added).

21. As noted in the prior discussion in this order, the Court has conducted both a legal and factual analysis of the probable outcome of the pending ad valorem tax cases. It is not, however, necessary that the Court have gone through such an analysis to the point of reaching a binding conclusion that one party of the other would prevail. Certainly, the Court has recognized the complexity of all of the issues involved, the length of time required to resolve all of these issues, the expense involved in resolving all of these issues, the uncertainty of result, and the potential devastating effect an adverse ruling would have upon the liquidating trust and its ability to pay claims to creditors and return the surplus to the debtors.

22. The compromise proposed to the Court is one which is an exercise of business judgment which appears to the Court to be sound, reasonable and practical. It recognizes a large savings in tax to the liquidating trust; it permits the debtor, by appeal only, to continue its attempt to invalidate the tax claims in their entirety for failure of the taxing authorities to have filed proofs of claim in these proceedings; and it assists in the orderly completion of the work to be done in ending this case.

23. One of the obligations imposed by *Jackson Brewing Co., supra*, upon bankruptcy courts engaged in determining whether to approve a settlement proposed requires a consideration of "all the factors bearing on the wisdom of the compromises". The Court believes it has done so, and it recognizes the benefits which flow to each of the parties involved. The taxing authorities receive a substantial amount of cash and an end to time consuming and expensive litigation on their part. The Bank of New York receives property free of any further claims by the taxing authorities, and the debtors receive a resolution of County tax claims on excellent terms. In sum, having reviewed the evidence and the documents received into evidence, together with having considered the equities involved, the Court finds and determines that the amended settlement agreement does not "fall below the lowest point in the range of reasonableness". The terms of the amended settlement are reasonable and in the best interest of the liquidating trust.

Accordingly, it is hereby ORDERED AND ADJUDGED:

1. That the Amended Settlement Agreement be and it is hereby ratified, confirmed and approval, pursuant to Bankruptcy Rule 9019(a);

2. That the parties hereto are directed to implement and comply with the terms of the Amended Settlement Agreement as set forth in its entirety.

3. The Court will enter a separate Final Judgment dismissing adversary proceeding 88-0117-BKC-SMW-A, in accordance with the terms of these findings.

DONE AND ORDERED in Chambers in Miami, Dade County, Florida on this 18th day of November, 1988.

/s/ SIDNEY M. WEAVER
Sidney M. Weaver
Bankruptcy Court Judge

Herbert Stettin, Esquire
will furnish copies to
all counsel of record
upon receipt of conformed
copy.

EXHIBIT "H"

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 89-0070-Civ-Atkins

In re:

HOLYWELL CORPORATION, et al.,

Debtors.

CHOPIN ASSOCIATES, acting by
THEODORE B. GOULD, et al.,

Appellants,

vs.

FRED STANTON SMITH, as Trustee of
THE MIAMI CENTER LIQUIDATING TRUST, et al.,

Appellees.

ORDER AFFIRMING BANKRUPTCY COURT'S ORDER APPROVING AMENDED SETTLEMENT OF AD VALOREM TAX CLAIMS

This cause is before the court on the debtors' appeal from the bankruptcy court's order, dated November 18, 1989 (the "Order"), approving an amended settlement of outstanding and potential tax disputes between Dade County Taxing Authorities and the Liquidating Trustee of the Miami Center Liquidating Trust. A hearing on the appeal was held before this court on April 25, 1989. Now, upon consideration of the responsive briefs, the hearing, and the relevant case law and rules, it is

ORDERED AND ADJUDGED that the order is *AFFIRMED.*

BACKGROUND INFORMATION

This appeal arises out of the bankruptcy's court's approval of a settlement reached between the appellees Dade County Taxing Authority ("Dade County") and Fred Stanton Smith, Liquidating Trustee of the Miami Center Liquidating Trust (the "Liquidating Trustee"). Veterans of *Holywell* litigation will, in the present order, have to content themselves with a pared-down version of the facts; the uninitiated should consult earlier opinions for a more complete factual panorama.

In August, 1984, the debtors filed simultaneous Chapter 11 petitions in the United States Bankruptcy Court for the Southern District of Florida.[1] The amended reorganization plan (the "plan") was confirmed one year later, and the plan, by its terms, created the Miami Center Liquidating Trust (the "trust"). The plan further provided for the appointment of a liquidating trustee and required the trustee to sell the subject property to the appellee Bank of New York (the "Bank") or its nominee. The property was sold to the Bank's nominee, City National Bank ("City National"), on October 10, 1985.

From 1982 until the present, certain ad valorem taxes on the subject property were not fully paid. The parties were aware of this when the property was sold in 1985. The confirmation plan therefore required the liquidating trustee, at the 1985 closing, to escrow part of the property's purchase price to cover any outstanding ad valorem taxes. This escrow fund now contains approximately $8.5 million.

Shortly after the 1985 sale, Dade County attempted to settle with the trust matters pertaining to the ad valorem taxes allegedly due against the subject property. The first round of settlement negotiations failed, but the liquidating

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[1]The debtors are Theodore Gould, Holywell Corporation, Miami Center Limited Partnership, Miami Center Corporation, and Chopin Associates.

trustee, in March, 1988, filed a motion in bankruptcy court for an order authorizing a compromise of all outstanding ad valorem taxes against the property from 1979 through 1985. Under the proposed settlement, the trust would pay Dade County $3,430,754.34 in ad valorem taxes for the period running from 1979 through 1984. Additionally, the Bank would return to the trust a reprorated sum assessed against the trust at the consummation of the 1985 sale. The settlement further required the trust to waive certain claims against Dade County for alleged overpayments of taxes, in exchange for which the County waived or favorably adjusted numerous assessments against the trust. *See* Order, at 5. With the exception of the appellants, who continued to maintain that the County did not hold valid tax liens, the affected parties agreed to the proposal.

The merits of the proposal were scrutinized at a two-day evidentiary hearing conducted by the bankruptcy court in April, 1988. The parties submitted to the bankruptcy court written memoranda in support of their respective positions. The bankruptcy court concluded that the proposal was fair, but the court refused to issue its approval until the parties struck from the proposal the post-petition interest payment that was to have been assessed against the trust. *See* Order, at 7-8. The provision was deleted, and the bankruptcy court, after yet another hearing, finally approved the proposal on November 18, 1988. In so doing, the bankruptcy court also dismissed the related adversary proceeding filed by the appellants. This appeal followed.

DISCUSSION

The former Fifth Circuit case of *In re Matter of Jackson Brewing Co.*, 624 F.2d 605 (5th Cir. 1980), furnishes the touchstone for the present inquiry. The *Jackson* court explained that the bankruptcy court, before it approves a settlement, must scrutinize the facts of its case with sufficient detail to determine:

(1) The probability of success in the litigation, with due consideration for the uncertainty in fact and law,

(2) The complexity and likely duration of the litigation and any attendant expense, inconvenience and delay, and

(3) All other factors bearing on the wisdom of the compromise.

Id. at 607 (relying on *Protective Committee for Independent Stockholder of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968)). The purpose of such a test is to ensure that the bankruptcy court has before it sufficient facts to permit an informed, independent evaluation of the proposal. *Matter of AWECO, Inc.*, 725 F.2d 293, 299 (5th Cir. 1984); *see also In Re American Reserve Corp.*, 841 F.2d 159, 162 (7th Cir. 1987) (bankruptcy court cannot merely "rubber stamp" the settlement proposal).

The reviewing court's primary duty is to determine whether the compromise approved by the bankruptcy court is "fair, equitable, and in the best interest of the estate." *Jackson*, 624 F.2d at 608; *see also In re A & C Properties*, 784 F.2d 1377, 1381 (9th Cir. 1986) (reviewing court must determine whether the settlement is reasonable on the facts of the case). To discharge this duty, the reviewing court must determine, first, that there existed a "substantial factual basis for the compromise" and, second, that the bankruptcy court has drawn "articulate findings and conclusions" from that factual basis. *Jackson*, 624 F.2d at 608. If this test is passed, the reviewing court "may not reverse absent some other abuse . . . of . . . discretion." *Id.* (relying on *Florida Trailer & Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960)). When conducting this inquiry, the reviewing court must, of course, uphold factual findings that are not clearly erroneous, *see* Fed. R. Civ. P. 52, and it must always bear in mind that public policy favors settlement over protracted, costly litigation.

Applying these principles to the facts of the present case, the court concludes that the bankruptcy court's ruling should be affirmed. The bankruptcy court conducted a searching *Jackson* inquiry, and it approved the proposal only after the proceedings yielded a welter of evidence bearing on the propriety of settlement. For example, both A. H. Blake, a former tax assessor, and the liquidating trustee, an experienced real estate broker, testified that the proposed settlement resolved tax matters very favorably for the trust. Order, at 3-4. Several reduced valuations undertaken by Dade County for settlement purposes also conferred large tax breaks upon the trust. *See id.* at 5-6 (discussing procedures which "adjust[] the assessments very considerably in favor of the liquidating trust"). The bankruptcy court also observed that the Bank's reproration of funds received from the trust in October, 1985, would return to the trust an additional $400,000 to $500,000. *Id.* at 7. The net result is that the payments due under the proposal will consume less than half the money in the escrow account, thereby conferring substantial savings upon the trust.[2]

Against these and many other benefits, the bankruptcy court balanced the detriments which the appellants claimed would attend the proposed settlement. *See* Order, at 9-10. The bankruptcy court was aware that the appellees had, for years, been involved in state court litigation which challenged the County's ad valorem tax assessments. The court nevertheless believed that these proffered detriments were outweighed by the benefits attending settlement — the court observed that the issues raised by the state court litigation were complex, that the outcome of the litigation was, at best, uncertain, and that the litigation itself was extremely expensive. *Id.* at 3-4

[2]The appellants do not dispute that "[a]ny savings realized upon a successful resolution of the property tax litigation would be payable into the Miami Center Liquidating Trust for the benefit of the remaining creditors." Answer Brief of Appellees Bank of New York, et al., at 3.

& 10. The bankruptcy court therefore concluded that the settlement would inure to the best interests of the estate. This conclusion finds ample support in the record, and the court, at this juncture, perceives no reason to disturb it.

The appellants, however, advance a number of arguments to the contrary. The appellants argue, *inter alia*, that Dade County's failure to file proofs of claims precludes the County from enforcing any ad valorem tax liens against the property; that various sections of the Bankruptcy Code further bar the County's claims; and that the County's assessments violate the Equal Protection Clause of the Fourteenth Amendment. The appellants also argue that the bankruptcy court lacked jurisdiction to approve the proposed settlement because such approval compromised the claims of non-party St. Joe Paper Company. They also argue that bankruptcy court committed a host of errors pertaining to interest payments. Although the exact thrust of this outpouring is unclear, the appellants appear to believe that the bankruptcy court committed various legal errors and that these errors, viewed separately or in the aggregate, warrant reversal.

The appellants misunderstand the nature of the present inquiry. Legal arguments advanced by a settlement dissenter must, at the review stage, be assessed not in a vacuum but, rather, with reference to the overarching principles delineated in *Jackson*. That is to say, the district court does not conduct a "mini-trial" on the merits of each claim purportedly compromised by a bankruptcy settlement; rather, the district court determines only whether the bankruptcy court, by compromising those claims, abused its discretion and approved a settlement which was not fair, reasonable, or in the best interests of the estate. *See In re Blair*, 538 F.2d 849, 851-52 (9th Cir. 1976) (decision on whether there should be trial on merits of compromised claim is vouchsafed to sound discretion of bankruptcy court); *In re Hessinger Resources, LTD.*, 67 B.R. 378, 383 (C.D. Ill. 1986) (not necessary to conduct "mini-trial" on merits). A more

expansive standard of review would ignore the clear mandate of *Jackson* and undermine sound public policy. *See Florida Trailer & Equipment Co.*, 284 F.2d at 574 (policy favoring settlement would be undermined if reviewing court could disturb settlement which compromises potentially valid claim).

Viewed in this light, the court now turns to the more salient arguments advanced by the appellants.[3] The appellants first argue that the County's failure to file proofs of claims prevents the County from enforcing liens against the property. This argument does not, however, warrant reversal. Bankruptcy Rule 3003(c)(2) prevents certain non-filing creditors from being treated as such for purposes of "voting or distribution"; but the Rule does *not* "prevent such a creditor from *otherwise participating* in the case." 8 *Collier on Bankruptcy* § 3003.05[3] & n.8 (15th ed. 1989) (emphasis added). It is therefore not clear whether Rule 3003(c)(2) bars Dade County's claims in the present case: the County's success or failure depends on whether receipt of settlement proceeds constitutes proscribed "distribution," or mere "participation in the case." At best, then, the appellants' argument raises an novel issue of law that has not been decided in this circuit — it hardly proves that the omnibus settlement was unfair, inequitable, or not in the estate's best interests. *Compare In re South Atlantic Financial Corp.*, 767 F.2d 814, 819 (11th Cir. 1985) (court addresses distinct question dealing with adequacy of filing).

The appellants' "jurisdictional" argument fails for a similar reason. Although it might, perhaps, be argued that a bankruptcy court abuses its discretion when it compromises the rights of a non-party, the present appellants simply cannot make that argument. There was no tangible evidence that St. Joe Paper Company (the non-party in question) even-

[3]Although the court has reviewed all of the arguments advanced by the appellants, the court will, in the present order, undertake to discuss only the timely, relevant arguments.

held a continuing ownership interest. Nor was there any evidence that St. Joe Paper Company held a claim for the recovery of tax overpayments. *See* Order, at 4-5. Far from demonstrating that the settlement was unfair, then, the appellants' jurisdictional argument — *viz.* that a bankruptcy court cannot approve a settlement absent the participation of a non-party whose interest cannot be proved — is meritless.

Examination of the remaining arguments leads to the same conclusion. First, the appellants argue that the County's tax assessments were discriminatory and thus violative of the Equal Protection Clause. Compromising this claim in favor of settlement was, however, hardly an abuse of discretion: the taxpayer seeking to prevail on a discrimination claim faces an extremely stringent burden of proof, *see* Testimony of John Fletcher, at 11 (discussing burden of proof); Testimony of A. H. Blake, at 39 (noting that "[t]o win an ad valorem tax case is pretty near impossible"); *Deltona Corporation v. Bailey*, 336 So. 2d 1163, 1168 (Fla. 1976) (plaintiff whose property is assessed at fair market value must prove that "his property is assessed at a percentage of value *substantially higher* than the percentage at which *all* other property in the county is generally assessed") (emphasis added), and the present appellants have not been able to surmount that burden in any of their repeated, costly state court forays.

Finally, the court rejects the appellants' comprehensive "unfairness" argument. The gist of this argument is that the settlement impermissibly favored the Bank over the trust, and that the bankruptcy court approved a proposal which was a "bad deal" for the trust. The bankruptcy court, however, found that the proposal played no favorites. The court also found that the settlement redounded to the trust's best interests. These findings are well supported by credible evidence. Accordingly, the clearly erroneous standard precludes this court from substituting its own factual findings for those of the bankruptcy court.

CONCLUSION

The court has carefully reviewed the record, the bankruptcy court's rulings, and the arguments which support and attack those rulings. This court believes that the bankruptcy court conducted a thorough inquiry into the propriety of settlement, and that its ultimate decision was clearly articulated and well supported. The court also finds that the settlement was eminently fair, reasonable, and in the best interests of the estate. The appellants' contrary arguments do not warrant a different conclusion. Accordingly, the bankruptcy court's rulings must be *AFFIRMED*.

DONE AND ORDERED at Miami, Florida this 6th day of July, 1989.

/s/ C. CLYDE ATKINS

C. Clyde Atkins
United States District Judge

cc: Mr. Robert M. Musselman
Mr. Robert A. Mark
Mr. Theodore B. Gould
Mr. Herbert Stettin
Mr. Thomas F. Noone
Mr. S. Harvey Zeigler
Mr. James Kracht & Mr. Daniel Weiss
Mr. Fred Stanton Smith
Mr. Vance E. Salter
Mr. James F. McAuley

11 U.S.C. § 541. Property of the estate.

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsection (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, device, or inheritance;

(B) as a result of a property settlement agreement with debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

11 U.S.C. § 1141. Effect of confirmation.

(a) Except as provided in subsection (d)(2) and (d)(3) of this section, the provisions of a confirmed plan bind the debtor, any entity issuing securities under the plan, any entity acquiring property under the plan, and any creditor, equity security holder, or general partner in the debtor, whether or not the claim or interest of such creditor, equity security holder, or general partner is impaired under the plan and whether or not such creditor, equity security holder, or general partner has accepted the plan.

11 U.S.C. § 1142. Implementation of plan.

(a) Notwithstanding any otherwise applicable nonbankruptcy law, rule, or regulation relating to financial condition, the debtor and any entity organized or to be organized for the purpose of carrying out the plan shall carry out the plan and shall comply with any orders of the court.

(b) The court may direct the debtor and any other necessary party to execute or deliver or to join in the execution or delivery of any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan.

11 U.S.C. § 3020. Deposit; confirmation of Plan

(a) *Deposit.* In a chapter 11 case, prior to entry of the order confirming the plan, the court may order the deposit with the trustee or debtor in possession of the consideration required by the plan to be distributed on confirmation. Any money deposited shall be kept in a special account established for the exclusive purpose of making the distribution.

(b) *Objections to and Hearing on Confirmation.*

(1) *Objections.* Objections to confirmation of the plan shall be filed with the court and served on the debtor, the trustee, any committee appointed under the Code and on any other entity designated by the court, within a time fixed by the court. An objection to confirmation is governed by Rule 9014.

(2) *Hearing.* The court shall rule on confirmation of the plan after notice and hearing as provided in Rule 2002. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.

(c) *Order of Confirmation.* The order of confirmation shall conform to Official Form No. 31 and notice of entry thereof shall be mailed promptly as provided in Rule 2002(f) to the debtor, creditors, equity security holders and other parties in interest.

(d) *Retained Power.* Notwithstanding the entry of the order of confirmation, the court may enter all orders necessary to administer the estate.

11 U.S.C. § 9027. Removal

(a) *Application.*

(1) *Where Filed; Form and Content.* An application for removal shall be filed with the clerk for the district

and division within which is located the state or federal court where the civil action is pending. The application shall be verified and contain a short and plain statement of the facts which entitle the applicant to remove and be accompanied by a copy of all process and pleadings.

(2) *Time for Filing: Civil Action Initiated Before Commencement of the Case Under the Code.* If the claim or cause of action in a civil action is pending when a case under the Code is commenced, an application for removal may be filed only within the longest of (A) 90 days after the order for relief in the case under the Code, (B) 30 days after entry of an order terminating a stay, if the claim or cause of action in a civil action has been stayed under § 362 of the Code, or (C) 30 days after a trustee qualifies in a chapter 11 reorganization case but not later than 180 days after the order for relief.

(3) *Time for Filing; Civil Action Initiated After Commencement of the Case Under the Code.* If a case under the Code is pending when a claim or cause of action is asserted in another court, an application for removal may be filed with the clerk only within the shorter of (A) 30 days after receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim or cause of action sought to be removed or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons.

(b) *Bond.* An application for removal, except when the applicant is the trustee, debtor, debtor in possession, or the United States shall be accompanied by a bond with good and sufficient surety conditioned that the party will pay all costs and disbursements incurred by reason of the removal should it be determined that the claim or cause of action ws not removable or was improperly removed.

(c) *Notice.* Promptly after filing the application and the bond, if required, the applicant shall serve a copy of the application on all parties to the removed claim or cause of action.

(d) *Filing in Non-Bankruptcy Court.* Promptly after filing the application and bond, if any, the applicant shall file a copy of the application with the clerk of the court from which the claim or cause of action is removed. Removal of the claim or cause of action is effected on such filing of a copy of the application. The parties shall proceed no further in that court unless and until the claim or cause of action is remanded.

(e) *Remand.* A motion for remand of the removed claim or cause of action shall be filed with the clerk and served on the parties to the removed claim or cause of action. Unless the district court orders otherwise, a motion for remand shall be heard by the bankruptcy judge, who shall file a report and recommendation for disposition of the motion. The clerk shall serve forthwith a copy of the report and recommendation on the parties. Within 10 days of being served with a copy of the report and recommendation, a party may serve and file with the clerk objections prepared in the manner provided in Rule 9033(b). Review by the district court of the report and recommendation shall be governed by Rule 9033.

(1) After removal of a claim or cause of action to a district court the district court or, if the case under the Code has been referred to a bankruptcy judge of the district, the bankruptcy judge, may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the court from which the claim or cause of action was removed or otherwise.

(2) The district court or, if the case under the Code has been referred to a bankruptcy judge of the district, the bankruptcy judge, may require the applicant to file with the clerk copies of all records and proceedings relating to the claim or cause of action in the court from which the claim or cause of action was removed.

(g) *Process After Removal.* If one or more of the defendants has not been served with process, the service has not been perfected prior to removal, or the process served proves to be defective, such process or service may be completed or new process issued pursuant to Part VII of these rules. This subdivision shall not deprive any defendant on whom process is served after removal of the defendant's right to move to remand the case.

(h) *Applicability of Part VII.* The rules of Part VII apply to a claim or cause of action removed to a district court from a federal or state court and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under the rules of Part VII within 20 days following the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief on which the action or proceeding is based, or within 20 days following the service of summons on such initial pleading, or within five days following the filing of the application for removal, which ever period is longest.

(i) [*Abrogated*].

(j) *Record Supplied.* When a party is entitled to copies of the records and proceedings in any civil action or proceeding in a federal or a state court, to be used in the removed civil action or proceeding, and the clerk of the federal or state court, on demand accompanied by payment or tender of the lawful fees, fails to deliver certified copies, the court may, on affidavit reciting the facts, direct such record to be

supplied by affidavit or otherwise. Thereupon the proceedings, trial and judgment may be had in the court, and all process awarded, as if certified copies had been filed.

(k) *Attachment or Sequestration; Securities.* When a claim or cause of action is removed to a district court, any attachment or sequestration of property in the court from which the claim or cause of action was removed shall hold the property to answer the final judgment or decree in the same manner as the property would have been held to answer final judgment or decree had it been rendered by the court from which the claim or cause of action was removed. All bonds, undertakings, or security given by either party to the claim or cause of action prior to its removal shall remain valid and effectual notwithstanding such removal. All injunctions issued, orders entered and other proceedings had prior to removal shall remain in full force and effect until dissolved or modified by the court.

28 U.S.C. § 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to—

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate; and

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

28 U.S.C. § 158. Appeals

(a) The district courts of the United States shall have jurisdiction to hear appeals from final judgments, orders, and decrees, and, with leave of the court, from interlocutory orders and decrees, of bankruptcy judges entered in cases and proceedings referred to the bankruptcy judges under section 157 of this title. An appeal under this subsection shall be taken only to the district court for the judicial district in which the bankruptcy judge is serving.

(b)(1) The judicial council of a circuit may establish a bankruptcy appellate panel, comprised of bankruptcy judges from districts within the circuit, to hear and determine, upon the consent of all the parties, appeals under subsection (a) of this section.

(2) No appeal may be referred to a panel under this subsection unless the district judges for the district, by majority vote, authorize such referral of appeals originating within the district.

(3) A panel established under this section shall consist of three bankruptcy judges, provided a bankruptcy judge may not hear an appeal originating within a district for which the judge is appointed or designated under section 152 of this title.

(c) An appeal under subsections (a) and (b) of this section shall be taken in the same manner as appeals in civil proceedings generally are taken to the courts of appeals from

the district courts and in the time provided by Rule 8002 of the Bankruptcy Rules.

(d) The courts of appeals shall have jurisdiction of appeals from all final decisions, judgments, orders, and decrees entered under subsections (a) and (b) of this section.

28 U.S.C. § 1254. Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11.

(b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c)(1) Nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction. Any decision to abstain made under this subsection is not reviewable by appeal or otherwise. This subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(d) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate.

28 U.S.C. § 1452. Removal of claims related to bankruptcy cases

(a) A party may remove any claim or cause of action in a civil action other than a proceeding before the United States Tax Court or a civil action by a governmental unit to enforce such governmental unit's police or regulatory power, to the district court for the district where such civil action is pending, if such district court has jurisdiction of such claim or cause of action under section 1334 of this title.

(b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order entered under this subsection remanding a claim or cause of action, or a decision to not remand, is not reviewable by appeal or otherwise.

Supreme Court Rule 17. Considerations governing review on certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of of[1] the United States Court of Appeals for the Federal Circuit, the United States Court of Military Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

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[1]So in original.